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75-6933

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NATHANIEL BROWN

Petitioner

vs.

STATE OF OHIO

Respondent

****

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of Ohio,
Eight Appellate District

****

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IN THE SUPREME COURT OF THE UNITED STATES

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NATHANIEL BROWN

Petitioner

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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals of Ohio,
Eight Appellate District

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Unites States:

Petitioner, Nathaniel Brown, prays that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals, Eight Appellate District, which judgment became final on March 19, 1976 when the Supreme Court of Ohio denied further appellate review.

Opinions of the Courts Below

The journal entry of the Ohio Court of Appeals, not published, appears in the Appendix, infra at page 13. The journal entry of the Ohio Court of Appeals overruling a motion for reconsideration appears in the Appendix, infra at page 19. The journal entry of the Supreme Court of Ohio denying further appellate review appears in the Appendix, infra at page 20.

Jurisdiction

The judgment of the Ohio Court of Appeals, Eight District, was announced December 11, 1975, which judgment was entered on December 31, 1975 when a timely motion for reconsideration was overruled. The Supreme Court of Ohio denied further state appellate review on March 19, 1976. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3) in that the rights, privileges and immunities under the United States Constitution have been violated.

Question Presented

Can the state charge and convict a defendant of stealing a certain motor vehicle when the state has already charged and convicted the same defendant of the lesser included offense of operating the same motor vehicle without the owner's consent and both charges grow out of the same act?

Constitutional and Statutory Provisions Involved

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ohio Revised Code

§ 4549.04 Stealing motor vehicles.

(A) No person shall steal any motor vehicle.

(B) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner, and either remove it from this state, or keep possession of it for more than forty-eight hours.

(C) No person shall, with intent to defraud, hire a motor vehicle or operate or keep a motor vehicle which has been hired. It is prima-facie evidence of an intent to defraud if the offender does any of the following:

(1) Hires the motor vehicle by means of any false representation or by means of the unlawful use of a credit card;

(2) Hires the motor vehicle knowing he is without sufficient means to pay the hire;

(3) Absconds without paying the hire for the motor vehicle;

(4) Knowingly fails to pay the hire for the motor vehicle on its return, in the absence of a prior agreement for extended credit, without reasonable excuse for such failure;

(5) Knowingly fails to return the motor vehicle as required by the contract of hire, without reasonable excuse for such failure.

(D) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner.

(E) No person shall receive, buy, operate, conceal, or dispose of a motor vehicle that was obtained by means of an auto theft offense, knowing or having reasonable cause to believe it to have been so obtained.

Statement of the Case

On December 8, 1973, petitioner, Nathaniel Brown, was arrested in the City of Wickliffe, Lake County, Ohio, and charged with violation of Ohio Rev. Code 4549.04(D), repealed 1/1/74, operating a motor vehicle without the owner's consent. The affidavit alleged December 8th as the date of the offense and that the motor vehicle was owned by Gloria Ingram. Petitioner plead guilty to the charge on December 10th in the Willoughby Municipal Court and was sentenced to 30 days in the Lake County Workhouse and fined $100.00 and costs.

While incarcerated in the Lake County Workhouse, the City of East Cleveland, Cuyahoga County, Ohio, charged petitioner with violation of Ohio Rev. Code 4549.04(A), repealed 1/1/74, stealing a motor vehicle. The complaint alleged November 29, 1973 as the date of the offense and that the automobile was owned by Gloria Ingram. The serial number of the automobile was the same as that alleged in the affidavit before the Willoughby Municipal Court.

On January 11, 1974, after petitioner was released from the Lake County Workhouse, petitioner answered the charge in the East Cleveland Municipal Court and plead former jeopardy. The Municipal Court denied the plea after oral argument and bound petitioner over the Cuyahoga County grand jury.

On Febuary 5, 1974, the Cuyahoga County grand jury returned an indictment against petitioner charging violation of Ohio Rev. Code 4549.04(A), with a second count charging violation of the lesser included offense of Ohio Rev. Code 4549.04(D). The indictment alleged that the automobile was owned by Gloria Ingram and that the offense took place on November 29th, 1973.

On March 18, 1974 a pretrial hearing was had in the Common Pleas Court of Cuyahoga County. The Defense informed the court that it wished to plead former jeopardy.[1] The trial court advised that it would accept a plea of guilty to the count charging violation of Ohio Rev. Code 4549.04(A) but would entertain a motion to withdraw the plea and dismiss the indictment on the grounds of double jeopardy. The State agreed petitioner would be permitted to file the motion.[2] Petitioner entered a conditional plea of guilty and the "count" charging violation of Ohio Rev. Code 4549.04(D) was nolled.[3]

Petitioner subsequently filed a motion to withdraw plea and dismiss the indictment on the grounds of double jeopardy. The trial court overruled the motion on November 26, 1974 and placed petitioner on probation.

Petitioner appealed his conviction to the Ohio Court of Appeals, Eight District. The court held that Ohio Rev. Code 4549.04(D) is a lesser included offense to Ohio Rev. Code 4549.04(A) and for the purposes of double jeopardy both were the same offense. (Journal Entry, p.4; Appendix, p.16) But the court affirmed. It held that although both offenses were the same, because two different dates were alleged the two convictions were premised on different acts. (Journal Entry, p.5;Appendix, p17)

Petitioner filed a timely motion for reconsideration arguing that both charges were based on a continuous act and subject to but one prosecution. The Court of Appeals denied the motion.

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1. Petitioner did not plead former jeopardy at the time of his arraingment on Febuary 19, 1974, for the reason that such plea at arraignment in Ohio is not permitted. See Author's Text, Ohio Crim. R. 11 and 12.

2. Of course, petitioner did not waive his right to assert the double jeopardy claim by pleading guilty. Menna v. New York, __U.S.__, 46 L. Ed. 2d 195, 197 (1975); Blackledge v. Perry, 417 U.S.21, 29-31, 40 L. Ed. 2d 628, 635-636 (1974).

3. For reasons that follow, the second "count" was superfluos and its nolle a nullity inasmuch as it is a lesser included offense to Ohio Rev. Code 4549.04(A). See Mullreed v. Kropp(6th Cir.) 425 F. 2d 1095, 1100 (1970).

Petitioner then appealed to the Supreme Court of Ohio. On March 19, 1976, the appeal was dismissed for the stated reason that, "...no substantial constitutional question exists herein."

Reasons for Granting the Writ

In Waller v. Florida, 397 U.S. 387, 25 L. Ed. 2d 435 (1970), this Court recognized the principle that a state is barred from seeking a prosecution of an offense when the state has obtained a conviction of a lesser included offense and both prosecutions are premised on the same act.[4] Waller, supra at 390 and 438. Although not cited in Waller, the Court's recognition of the prohibition is based on the doctrine in Blockburger v. United States, 284 U.S. 299, 76 L. Ed. 306 (1932); see In re Nielson, 131 U.S. 176, 187-191, 33 L.Ed. 118, 121-123 (1889). In Blockburger is was held that notwithstanding two distinct statutory provisions, unless each requires proof of an additional fact which the other does not, prosecution for both charges is barred. Blockburger, supra at 304 and 309.

The Ohio Court of Appeals for the Eight District agreed that the Blockburger doctrine is applicable to the instant case.[5] (Journal Entry, p. 3; Appendix,

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4. The more significant holding in Waller is of course that a municipality and the state are but one sovereign and that both can not do separately what neither can do individually. However, before the Court could reach this holding it had to find an infringement of the Double Jeopardy Clause based on the net effect of both convictions. It found such an infringement when the Court assumed that the first conviction in Waller was a lesser included offense to the second conviction. In the instant case, the two charges were brought by two different counties. The Court of Appeals held however, that this was not at issue. (Journal Entry, p. 2-3; Appendix, p.

5. The Blockburger doctrine was the law of Ohio eight years before the Blockburger decision. Duvall v. State, 111 Ohio St. 657, 665-666 (1924).

p. 15) The Court of Appeals further agreed that the facts in the instant case meet the test. That is, the charge in the Willoughby Municipal Court of operating a motor vehicle without the owner's consent in a lesser included offense to the charge of motor vehicle stealing as charged in the Common Pleas Court of Cuyahoga County. But as the Court of Appeals held:

> To prevail on his double jeopardy argument, however the appellant must also show that the two prosecutions are premised on the same operative act. This, appellant has failed to do. (Journal Entry, p. 4-5; Appendix, p. 16-17)

This is directly at odds with another statement in the Entry:

> It is undisputed that the automobile involved in the Lake County charge and the automobile involved in the Cuyahoga County charge is the same vehicle. (Journal Entry, p. 2; Appendix, p. 14)

By basing its decision on the fact that the first prosecution alleged December 8th as the date of the offense and the second prosecution alleged November 29th as the date of the offense, the Court of Appeals failed to realize the nature of a theft offense and the respective elements of the offenses charged. This failure results in some illogical conclusions.

First, because all of the elements of operating a motor vehicle without the owner's consent are included in the charge of motor vehicle stealing, the instant the car was allegedly stolen on November 29th, it, by definition, was also being operated without the owner's consent. Consequently, both charges grew out of the same act. Both the charge of motor vehicle stealing and operating continued from November 29th to December 8th and constituted one continuous act. It has never been alleged that the automobile was returned to the owner between November 29th and December 8th, and then taken a second time. It is

impossible for either or both to have ceased sometime between those two dates and thereby constituting a separate offense(s).

Second, the lesser charge of operating is alleged to have been committed subsequent to the greater charge of motor vehicle stealing. On its face this is a contradiction of the doctrine of lesser included offenses. A lesser offense often does evolve into a greater offense when the additional elements are supplied. But under the Court of Appeals' reasoning it appears the reverse is true. That is, all of the elements of the greater offense could be present at a certain time but subsequnetly some of the elements dissipate leaving only the lesser included offense.

The reasoning of the Court of Appeals can not be allowed to stand. The decision not only ignores the nature of a theft offense in relation to the Double Jeopardy Clause, but also raises policy questions that render the Double Jeopardy Clause meaningless with respect to theft offenses or any other offense that is continuous by its nature.

I

A theft offense is by its nature a continuing offense. The Supreme Court of Ohio when commenting on the crime of concealing stolen property has stated it "...is a continuous act, as long as the property remains in control of the concealer, its continued control does not create new offenses from day to day... ." State v. Smith, 59 Ohio St. 350, 365, (1898). The same rule should also apply to actual taking. The actual taking does not exist in a vaccum without additional intent to keep the property no matter what the period of time.

The test for whether an act is continuous by its nature was quoted by this Court in United States v. Midstate Horticultural Company, Inc., 306 U.S. 161, 83 L. Ed. 563 (1939):

> A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occur. Id., at 166 and 567.

Other cases by this Court have considered the impulse or nature of the act in determining whether an act is continuous. E.g., Blockburger v. United States, 284 U.S. 299, 302, 76 L. Ed. 306, 308 (1932), (Selling different drugs on two different days is not a continuous act.); United States v. Kissel, 218 U.S. 601, 607, 54 L. Ed. 1168 (1910), (Conspriacy); In re Nielson, 131 U.S. 176, 185-187, 33 L. Ed. 118, 121 (1889); In re Snow, 120 U.S. 273, 281, 30 L. Ed. 658, 661 (1887), (Cohabitation with more than one woman for a three year period is one offense, "...inherently a continuous offense...")

The offense of motor vehicle stealing continues from the instant all of the elements of the offense are present and does not terminate until prosecution. Similiarly, the offense of operating a motor vehicle terminates upon prosecution but has continued from the very instant all of the elements were present. Each offense has a time continuum with a beginning and an end. And whenever prosecution attaches to one point on the continuum, it necessarily also attaches to the entire continuum.

Applied to the instant case, the State alleges that all of the elements of motor vehicle stealing were present on November 29, 1973. At any point thereafter all of the elements of operating were also present. Consequently, when the State prosecuted for operating on December 8, 1973, it was necessarily

also prosecuting for the same act that had started on November 29th whether it be motor vehicle stealing or operating.

This Court must grant the writ of certiorari and hold that theft offenses are continuous acts and can not be "split" to avoid violation of the Fifth Amendment Double Jeopardy Clause.

II

Lurking in the backgound of this case are certain policy considerations that the Double Jeopardy Clause seeks to protect. To allow the decision to stand will give impetus to the tendency of lax law enforcement. It will also completely emasculate the purpose of the Double Jeopardy Clause.

If the States wishes to prosecute for a greater offense, or for that matter any offense, they should do so at the first opportunity. Both the State and the accused benefit when the evidence is fresh. If the State had sufficient evidence to prove the offense of motor stealing the Lake County, Ohio authorities should have pressed for it in Lake County. The Lake County authorities presumably had all the information and resources available to them that the Cuyahoga County authorities.[6]

Moreover, to allow the decision to stand will permit law enforcement authorities to circumvent the Double Jeopardy Clause by arbitrarily alleging different dates. Indeed, under the Court of Appeals' holding each infinitesimal

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6. See Ohio Rev. Code 2931.23, repealed 1/1/74, but in effect at the time of petitioner's first conviction in Lake County:

"Whoever steals the property of another in one county of this state, and takes the same into another county, may be prosecuted, convicted, and punished in any county into or through which such stolen property was taken by him. The conviction or acquittal of such person of stealing such property in one county is a bar to another prosecution for such offense."

instant from November 29, 1973 to December 8, 1973, could have been the basis for a different charge subjecting petitioner to additional punishment.[7]

When petitioner, who was not represented by counsel in Lake County, plead guilty in Lake County he was lulled into a false sense of security. As far as petitioner knew, he was to serve 30 days in the Lake County Workhouse and upon release the matter was to be over. But it was not over. Upon release he had to face the greater charge of motor vehicle stealing in Cuyahoga County.

> ...the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 204 (1957).

7. Compare In re Snow, 120 U.S. 274, 282, 30 L. Ed. 658, 662 (1887), "The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on ad infinitum, for smaller periods of time. ...and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more."

Conclusion

For the foregoing reasons, a writ of certiorari should issue to the Ohio Court of Appeals, Eight Appellate District, to review the judgment entered against petitioner.

Respectfully submitted,

Robert Plautz

Robert Plautz, of counsel

Glenn Billington

Glenn Billington, Member of the Bar of The Supreme Court

Certificate of Service

I, Robert Plautz, do swear, that on the 14th day of June, 1976, I placed the foregoing Petition for Certiorari in the United States Mail, with first class postage prepaid, and the same was addressed to John T. Corrigan, Prosecutor of Cuyahoga County, Ohio, at 1560 East 21st Street, Cleveland, Ohio 44114.

Robert Plautz

Robert Plautz

Sworn to, before me and subsribed in my presence, this 14th day of June, 1976.

Glenn Billington

Notary

GLENN E. BILLINGTON, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 34316

STATE OF OHIO

APPELLEE

-vs-

NATHANIEL BROWN

APPELLANT

APPEAL FROM

COMMON PLEAS COURT
(Criminal)
No. 12062

JOURNAL ENTRY

DATE DEC 11 1975

This cause came on to be heard upon the pleadings and the ..... transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On November 29, 1973 an automobile was stolen from a parking lot in East Cleveland. On December 8, 1973, the appellant was arrested in Lake County, and charged with operating a motor vehicle without the owner's consent in violation of R. C. 4549. 04(D) (repealed 1-1-74). Appellant plead guilty to the charge in Willoughby Municipal Court and was sentenced to 30 days in the county workhouse and fined $100 and costs.

On February 5, 1974, the Cuyahoga County grand jury indicted appellant for auto theft (R. C. 4549. 04(A), repealed 1-1-74) and operating a motor vehicle without the owner's consent (R. C. 4549. 04(D), repealed 1-1-74). On March 18, 1974 the appellant plead guilty to auto theft with the understanding that a motion to dismiss

to raise the issue of double joepardy could be filed. The second count of the indictment was nolled. It is undisputed that the automobile involved in the Lake County charge and the automobile involved in the Cuyahoga County charge is the same vehicle. Appellant's motion to dismiss was overruled.

The appellant appeals the overruling of his motion to dismiss assigning the following error:

> "The trial court erred in overruling defendant's motion to withdraw plea and dismiss the indictment against him on the grounds of double jeopardy where the defendant had plead guilty and been convicted of operating a motor vehicle without the owner's consent in a municipal court under Ohio Rev. Code 4549. 04(D) and the indictment charged automobile stealing under Ohio Rev. Code 4549. 04(A) and both the affidavit in the municipal court and the indictment are based on the same act. "

In State of Ohio v. Best (1975), 42 Ohio St. 2d 530, the Ohio Supreme Court stated that:

> "2. To sustain a plea of former jeopardy it must appear:
> (1) That there was a former prosecution in the same state for the same offense;
> (2) that the same person was in jeopardy on the first prosecution;
> (3) that the parties are identical in the two prosecutions; and
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar. "

There is no dispute that the appellant was the person in jeopardy on the first prosecution or that the parties are identical in the two prosecutions. The fact that the Lake County prosecution was brought in the name of the City of Wickliffe, and the Cuyahoga County prosecution was brought in the name of the State of Ohio does not defeat identity of parties. For purposes of double jeopardy, state and municipal governments are considered as a single sovereign. Waller v. Florida (1970), 397 U. S. 387, 25 L. Ed. 2d 435; and State of Ohio vs. Best, supra. The

real issue in this case is whether or not the Cuyahoga County prosecution is for the same offense that the appellant was convicted of in Lake County. The double jeopardy clause of the Fifth Amendment to the United States Constitution is a bar to a prosecution only if the defendant was previously prosecuted for the identical offense. State v. Best, supra.

Identity of offense consists of two components: (1) identity of the statutory offense and (2) identity of the operative act. A single act or transaction may violate more than one statutory provision. A prosecution for violation of one such provision will bar prosecutions under the other statutory provisions only if the other provisions proscribe the same offense. The Supreme Court of Ohio has stated the rule to be applied to determine if two distinct statutory provisions proscribe the same offense for purposes of double jeopardy:

> "The applicable rule under the Fifth Amendment is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (Blockburger v. United States, 284 U. S. 299, and Duvall v. State, 11 Ohio St. 657, followed.)"
>
> State of Ohio v. Best, supra.

In other words, two statutory offenses are the "same offense" for purposes of double jeopardy if proof of the elements of one of the offenses would support a conviction on the other offense or one offense is a lesser included offense of the other offense.

The appellant was charged in the Willoughby Municipal Court with violation of R. C. 4549. 04(D), "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." In Cuyahoga County the appellant was charged with violation of R. C. 4549. 04(A), "No person shall steal any motor vehicle."

Every element of the crime of operating a motor vehicle without the consent of the owner is also an element of the crime of auto theft. "The difference between the crime of stealing a motor vehicle, and operating a motor vehicle without the consent of the owner is that conviction for stealing requires proof of an intent on the part of the thief to permanently deprive the owner of possession." State of Ohio v. Ikner (C. A., Cuyahoga Cty., 1974, Case No. 33065), appeal to Ohio Supreme Court pending. Applying the rule laid down in State of Ohio v. Best, supra., the crime of operating a motor vehicle without the consent of the owner is a lesser included offense of auto theft and both offenses are the same offense" for purposes of double jeopardy.

The appellee cites the case of State v. Marcum (C. A. Franklin Cty., 1969), 18 Ohio App. 2d 190 to support their argument that operating a motor vehicle is not a lesser included offense of auto theft. The first syllabus of that case reads as follows:

> "1. The crime of operating a motor vehicle without the owner's consent . . . is not a lesser included offense of the crime of motor vehicle theft...."

We do not find this case persuasive because the body of the opinion itself never discusses the issue of whether or not operating a motor vehicle without the owner's consent is a lesser included offense of auto theft. Also, the first paragraph of the court's opinion contradicts the courts' statement in the first syllabus.

> "The jury returned a verdict of 'not guilty to auto theft. They did find him guilty of a lesser included offense - operating a motor vehicle without the owner's consent."
>
> State v. Marcum, supra. at 191.

Since R. C. 4549. 04(D) is a lesser included offense of R. C. 4549. 04(A) appellant has established that for purposes of double jeopardy the two prosecutions involve the same statutory offense. To prevail on his double jeopardy argument, however

the appellant must also show that the two prosecutions are premised on the same operative act. This, appellant has failed to do. The charge in Cuyahoga County arose out of a theft which occurred on November 29th in East Cleveland. The charge in Lake County arose out of the actions of the appellant in operating the car in Lake County on December 8th. The two prosecutions are based on two separate acts of the appellant, one which occurred on November 29th and one which occurred on December 8th. Since appellant has not shown that both prosecutions are based on the same act or transaction, the second prosecution is not barred by the double jeopardy clause.

Appellant also argues that the doctrine of "merger" precludes the imposition of separate sentences for violations of R. C. 4549. 04(A) and R. C. 4549. 04(D). The doctrine of "merger" precludes separate sentences on multiple convictions when the convictions are based upon the same act. State v. Botta (1971), 27 Ohio St. 2d 196; State v. Ikner, supra. As noted above, the two convictions were based on two distinct acts and not the same act; therefore, the doctrine of merger is inapplicable.

Appellant's assignment of error is not well taken. The judgment of the Court of Common Pleas is affirmed.

It is ordered that appellee recover of appellant ____its____ costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, P.J., _____

MANOS, J., _____

SILBERT, J., CONCUR. _____
(Silbert, J., Retired Judge of the Eighth Appellate District, Sitting by Assignment)

John V. Corrigan
PRESIDING JUDGE
JOHN V. CORRIGAN

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee: John T. Corrigan

For defendant appellant: Robert Otto Carson

COPIES MAILED TO COUNSEL FOR ALL PARTIES. — COSTS TAXED.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY

EMIL J. MASGAY, CLERK OF COURTS

State of Ohio
vs. APPELLee

Nathaniel Brown
APPELLant

COURT OF APPEALS NO. 34316

LOWER COURT NO. C.P. 12062-Cr.

MOTION NO. 31620

DATE December 31, 1975

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

RECEIVED FOR FILING

DEC 31 1975

GERALD E. FUERST
By Deputy

CORRIGAN, P.J.,

MANOS, J.,

SILBERT, J., CONCUR.
(Silbert, J., Retired Judge of the Eighth Appellate District, Sitting by Assignment)

PRESIDING JUDGE
JOHN V. CORRIGAN

COPIES MAILED TO COUNSEL FOR
[illegible] — COSTS TAXED.

BOOK 61 PAGE 969

IN THE SUPREME COURT OF OHIO

Case No. 76-224

STATE OF OHIO

Appellee

vs.

NATHANIEL BROWN

Appellant

APPEAL FROM THE COURT OF APPEALS FOR
CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exits herein.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NATHANIEL BROWN

Petitioner

vs.

STATE OF OHIO

Respondent

75 - 6933

****

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

****

Petitioner, Nathaniel Brown, asks leave to file the attached Petition for a Writ of Certiorari to the Ohio Court of Appeals, Eight Appellant District, without payment of costs and to proceed in forma pauperis pursuant to Rule 33.

Petitioner's affidavit is support of the motion is attached.

Respectfully submitted,

Robert Plautz

ROBERT PLAUTZ,
of counsel

Glenn Billington

GLENN BILLINGTON,
Member of the Bar of The
Supreme Court

Attorneys for Petitioner

STATE OF OHIO)
COUNTY OF CUYAHOGA) S.S. AFFIDAVIT

I, Nathaniel Brown, being first duly sworn despose and say:

1. I am the petitioner in the above entitled cause.

2. Because of my poverty I am unable to pay costs of said cause.

3. I am unable to give security for the cause.

4. My mother has in the past paid to my attorney, Robert Plautz, some money to defend me and prosecute my appeals but she is unable to pay any further money.

5. I believe I am entitled to redress in said cause.

6. The nature of said cause is briefly stated as follows:

On December 10th, 1973, I plead guilty to the charge of operating a motor vehicle without the owner's consent. At the time of pleading guilty I was not represented by counsel and thought the matter was to be over after I served my sentence of 30 days in the Lake County Ohio Workhouse. However, while I was incarcerated there I was charged with the greater offense of stealing a motor vehicle. Both the charge of operating a motor vehicle without the owner's consent and stealing a motor vehicle are based on the same act. To charge me with me motor vehicle stealing after already having been convicted of operating the same motor vehilce without the owner's consent is in violation of my Fifth and Fourteenth Amendment rights of the United States Constitution.

Nathaniel Brown
Nathaniel Brown

SWORN TO, AND SUBSRCIBED, in my presence, this 14th day of June, 1976.

Glenn Billington
Notary

GLENN E. BILLINGTON, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6933

NATHANIEL BROWN

Petitioner,

—v.—

OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR CERTIORARI FILED JUNE 16, 1976
CERTIORARI GRANTED OCTOBER 18, 1976

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6933

NATHANIEL BROWN

—v.—

OHIO

Petitioner,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE COURT OF COMMON PLEAS
STATE OF OHIO
CUYAHOGA COUNTY

Case No: CR 12062

STATE OF OHIO

vs.

NATHANIEL BROWN, DEFENDANT

INDICTMENT FOR: Auto Stealing w/c OMVWOC

January 15, 1974:

Transcript: Cleveland East Muny Court, Bail $1,000. Surety: Peerless/V. Shury, Charge: Auto Theft.

February 5, 1974:

Indictment: Auto stealing w/ct operating a motor vehicle without owner's consent.

February 19, 1974:

BFC

February 26, 1974:

Arraignment.

February 26, 1974:

BFC vacated.

March 1, 1974:

Motion for a Bill of Particulars filed.

March 13, 1974:

Bill of Particulars filed.

March 18, 1974:

Changes plea to guilty of the 1st count of the indictment. ORP, count 2 nolled. RTP, OBC.

April 12, 1974:

Motion to withdraw plea filed.

June 10, 1974:

Brief in opposition to motion to change plea and to dismiss indictment filed.

June 24, 1974:

Reply to Brief opposing motion to change plea and dismiss indictment filed.

November 26, 1974:

Sentenced to 6 months in County Jail and the sentence is suspended, 1 yr. prob. and costs.

December 10, 1974:

Notice of Appeal filed.

December 10, 1974:

Notice of Appeal and copy of Docket sheet transferred to Court of Appeals.

RECORD ON APPEAL—January 20, 1974:

3-3-76 Nunc-Pro-Tunc 9-20-74. Deft's motion in re: Double Jeopardy overruled after hearing and briefs.

DEFT'S. EXH. A

WILLOUGHBY MUNICIPAL COURT

Case No. S-13799

COMPLAINT AND SUMMONS

CITY OF WICKLIFFE

vs.

NATHANIEL H. BROWN

The undersigned complainant, being duly sworn, states that on or about December 8, 1973, within Lake Wickliffe, Ohio, Nathaniel H. Brown did unlawfully and purposely take, drive or operate a certain motor vehicle to wit; a 1965 Chevrolet 2ds Serial 123477N159590 without the consent of the owner one Gloria Ingram 1427 E. 135th E. Cleveland, Ohio, contrary to and in violation of Section 4549.04 of the revised code of Ohio.

The complaint is based on Investigation of the Wilkliffe Police Department.

/s/ Hal Buckly #15

Sworn to and signed in my presence this 8th day of December, 1973 at Wickliffe, Ohio.

/s/ Robert [Illegible]
Deputy Clerk

[Summons and Certification omitted in printing]

S-13799

STATE

vs.

NATHANIEL BROWN

Defendant Appeared, Constitutional Rights and Pleas Explained.

Dec. 10, 1973

Plea; Guilty — Not Guilty — No Contest —

Finding: Guilty — Not Guilty —

/s/ David N. Patterson
DAVID N. PATTERSON
Judge

Date: Dec. 10, 1973

Fine: $100.00

Costs: $10.00

Sentence: 30 days in jail

Suspension conditioned on:

Time in jail to run concurrently with case No. S-13801

/s/ David N. Patterson
Acting Judge

[Certification omitted in printing]

IN THE EAST CLEVELAND MUNICIPAL COURT

COMPLAINT

THE STATE OF OHIO)
CUYAHOGA COUNTY) ss.
CITY OF EAST CLEVELAND)

BEFORE ME, [Illegible] Clerk of the East Cleveland Municipal Court, personally came Milton Jennrich who being duly sworn according to law, deposes and says, that on or about the 29th day of November A.D., 1973, at the City of East Cleveland, County of Cuyahoga and State of Ohio, one Nathaniel Brown, Jr. did unlawfully and intentionally take, steal, and drive away a 1967 Chevrolet automobile bearing Serial number 123477 N 1595 90, the property of Gloria Ingram, from the vicinity of the Doan Avenue, CTS parking lot, located in East Cleveland, Ohio.

I Charmaine Luhs, Deputy Clerk of The East Cleveland Municipal Court do hereby certify that the foregoing is a true copy filed in the case of *The State of Ohio* vs. *Nathaniel Brown.*

/s/ Charmaine Luhs
Deputy Clerk

To wit: Section 4549.04 O.R.C. contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Ohio. Further deponent sayeth not.

/s/ Milton Jennrich

Sworn to and subscribed before me, this 11th day of December A.D., 1973.

/s/ Esther W. Patch
Clerk of the
East Cleveland
Municipal Court

IN THE EAST CLEVELAND MUNICIPAL COURT

Case No. 158984

Charge: Section 4549.04RC

THE STATE OF OHIO
CUYAHOGA COUNTY
CITY OF EAST CLEVELAND

vs.

NATHANIEL BROWN JR.

Defendant arrested on a warrant founded on an affidavit, a certified copy of which is herewith attached, charging Nathaniel Brown Jr. with Auto Theft. Said affidavit was made before Esther W. Patch, Clerk of this Court, by Milton Jennrich, on the 11th day of December A.D., 1973.

Warrant issued to Chief of Police of said City and returned on the 8th day of January A.D., 1974, by Edward Wintersteller of said City of East Cleveland, with the body of the defendant.

The defendant was duly arraigned before James M. De Vinne, Judge of said Court, on the 11th day of January A.D., 1974, after announcement by the Court of the charge and of said defendant's rights and the reading of said affidavit, and entered no plea.

The preliminary examination was (held) before James M. De Vinne, Judge of said Court, on the 11th day of January A.D., 1974. Probable cause was found and it was ordered by the Court that said defendant furnish bail for his personal appearance at the next term of the Court of Common Pleas of Cuyahoga County on the first day of the term thereof, in the sum of One Thousand dollars cash or surety, or in default thereof to stand committed to County Jail. Surety bond power #483822 given on the 8th day of January, 1974 (copy attached) and defendant was released.

STATE OF OHIO, CITY OF EAST CLEVELAND, SS.

I, Ester W. Patch, Clerk of the East Cleveland Municipal Court, do hereby certify that the foregoing is a true transcript of the proceedings had before the said Court in said cause as fully as the same appears on record.

Given under my hand and the seal of said Court, this 11th day of January, A.D., 1974.

/s/ Esther W. Patch
Clerk of the
East Cleveland
Municipal Court

By /s/ Charmaine Luhs
Deputy Clerk

[Received for Filing Jan. 15, 1974, by E. J. Masgay, Clerk, N-M-19, 558E128]

INDICTMENT FOR AUTOMOBILE STEALING R.C. 4549.04(A)

w/ct OPERATING MOTOR VEHICLE WITHOUT OWNER'S CONSENT R.C. 4549.04(D)

THE STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

Of the term of JANUARY In the year of our Lord one thousand nine hundred and SEVENTY-FOUR.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

Do Find and Present, That Nathaniel Brown on or about the 29th day of November 1973, at the County aforesaid, unlawfully did steal a Chevrolet motor vehicle, the property of Gloria Ingram contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ John T. Corrigan
Prosecuting Attorney

INDICTMENT FOR OPERATING MOTOR VEHICLE WITHOUT OWNER'S CONSENT R.C. 4549.04(D)

THE STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

Of the term of JANUARY In the year of our Lord one thousand nine hundred and SEVENTY-FOUR.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

Do Find and Present, That Nathaniel Brown on or about the 29th day of November 1973, at the County aforesaid, unlawfully did purposely take, operate or keep a Chevrolet motor vehicle without the consent of Gloria Ingram, the owner thereof contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ John T. Corrigan
Prosecuting Attorney

IN THE COURT OF COMMON PLEAS
CRIMINAL BRANCH

Case No. CR 12062

Judge Frank Gorman

STATE OF OHIO)
) ss.
CUYAHOGA COUNTY)

STATE OF OHIO, PLAINTIFF

—*vs*—

NATHANIEL BROWN, DEFENDANT

BILL OF PARTICULARS

Responding to the request of the Defendant, Nathaniel Brown, for a Bill of Particulars, the Prosecuting Attorney says that the State of Ohio will prove on the trial of the above entitled case, the following:

That on or about the 29th day of November, 1973, between the hours of 8:00 A.M. and 5:15 P.M., at the CTS Doan Parking Lot in the City of East Cleveland, the Defendant, Nathaniel Brown unlawfully did steal a Chevrolet motor vehicle, and take, drive or operate such vehicle without the consent of the owner, Gloria Ingram, the property of Gloria Ingram, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

The Prosecuting Attorney says further that under the law governing indictments and Bills of Particulars, the Prosecuting Attorney is not required to disclose through a Bill of Particulars, the other evidentiary mat-

ters requested in the Defendant's Motion for a Bill of Particulars.

/s/ John T. Corrigan
Prosecuting Attorney

SERVICE

A copy of the foregoing Bill of Particulars has been mailed this 13th day of March, 1974, to Robert O. Carson, Attorney for Defendant, 12601 Shady Oak Boulevard, Garfield Heights, Ohio 44125, and Robert Plautz, Attorney for Defendant, 1110 Euclid Avenue, Cleveland, Ohio 44115.

/s/ John T. Corrigan
Prosecuting Attorney

IN THE COURT OF COMMON PLEAS

January Term, 1974

To-Wit: March 18, 1974

No. CR-12062

INDICTMENT Auto Stealing w/ct OMVWOC

STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

STATE OF OHIO, PLAINTIFF

vs.

NATHANIEL BROWN, DEFENDANT

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State of Ohio and defendant Nathaniel Brown, in open court with his counsel present and was fully advised of his constitutional rights.

Thereupon said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment says he is guilty of Auto Stealing, RC. 4549.04 (A), as charged in the first count, upon the recommendation of the Prosecuting Attorney, the Court enters a nolle prosequi as to the second count, and the plea, on the recommendation of the Prosecuting Attorney is accepted by the court.

It is further ordered that this cause be referred to the Probation Department for pre-sentence investigation and report. Original bond continued.

Frank J. Gorman, Judge
va
3/22

/s/ F. J. Gorman
Judge

[Received for Filing Mar. 27, 1974, E. J. Masgay, Clerk,
By [Illegible], Dep.]

VOL 230 PG 122

IN THE COURT OF COMMON PLEAS

January Term, 1976

To-Wit: March 3, 1976

No. CR 12062

INDICTMENT Auto Stealing w/c

STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

STATE OF OHIO, PLAINTIFF

vs.

NATHANIEL BROWN, DEFENDANT

JOURNAL ENTRY

NUNC-PRO-TUNC: as of and for September 20, 1974:

Defendant's Motion, In re: Double Jeopardy, is overruled, after hearing and Briefs.

Judge Frank J. Gorman
rg 3/4/76

/s/ F. J. Gorman
Judge

[Received for Filing Mar. 9, 1976, E. J. Masgay, Clerk,
By [Illegible], Dep.]

VOL 270 PG 12

IN THE COURT OF COMMON PLEAS

September Term, 1974

To-Wit: November 26, 1974

No. CR 12062

INDICTMENT Auto Stealing w/c OMVWOC

[Received for Filing Dec. 18, 1974, E. J. Masgay, Clerk,
By [Illegible], Dept.]

STATE OF OHIO,)
) ss
CUYAHOGA COUNTY)

STATE OF OHIO, PLAINTIFF

vs.

NATHANIEL BROWN, DEFENDANT

JOURNAL ENTRY

The defendant herein having, on a former day of court, plead guilty to Auto Stealing, RC 4549.04 as charged in the first count was this day brought into court with his counsel present.

Thereupon the court inquired of the said defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

It is therefore ordered and adjudged by the court that defendant Nathaniel Brown be imprisoned and confined in the County Jail for six (6) months, according to law and that he pay the cost of this prosecution for which execution is awarded. Sentence suspended and defendant placed on probation for one year under the

supervision of the Cuyahoga County Probation Department and pay costs.

Frank J. Gorman, Judge
rg 12/12/74

/s/ F. J. Gorman
Judge

VOL 243 PG 389

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. CR 12062

001 FRANK J. GORMAN

[Court of Appeals, Filed Dec. 20, 1974, Emil J. Masgay, Clerk of Courts, Cuyahoga County, Ohio]

STATE OF OHIO, PLAINTIFF-APPELLEE

—*vs*—

NATHANIEL BROWN, DEFENDANT-APPELLANT

NOTICE OF APPEAL

Now comes the defendant, Nathaniel Brown, and hereby gives notice of appeal to the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, from the sentence and judgment of the Common Pleas Court of Cuyahoga County in the above-entitled cause entered by said trial court by its sentence on the 26th day of November, 1974.

/s/ Robert Plautz
ROBERT PLAUTZ
1110 Euclid Avenue
Cleveland, Ohio 44115
861-1106

/s/ Robert Otto Carson/R.P.
ROBERT OTTO CARSON
9726 Park Heights
Garfield Heights, Ohio 44125
581-3737
Attorneys for Defendant-Appellant

34316

TO THE CLERK:

Please serve a copy of the foregoing Notice of Appeal on John T. Corrigan, Prosecuting Attorney, at 1560 East 21 Street, Cleveland, Ohio 44114.

/s/ Robert Plautz

/s/ Robert Otto Carson/R.P.
Attorneys for Defendant-Appellant

OURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 34316

[FILE COPY]

Appeal from Common Pleas Court
(Criminal)

No. 12062

STATE OF OHIO, APPELLEE

—*vs*—

NATHANIEL BROWN, APPELLANT

Date—Dec. 11, 1975

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

On November 29, 1973 an automobile was stolen from a parking lot in East Cleveland. On December 8, 1973, the appellant was arrested in Lake County, and charged with operating a motor vehicle without the owner's consent in violation of R.C. 4549.04(D) (repealed 1-1-74). Appellant plead guilty to the charge in Willoughby Municipal Court and was sentenced to 30 days in the county workhouse and fined $100 and costs.

On February 5, 1974, the Cuyahoga County grand jury indicted appellant for auto theft (R.C. 4549.04(A),

repealed 1-1-74) and operating a motor vehicle without the owner's consent (R.C. 4549.04(D), repealed 1-1-74). On March 18, 1974 the appellant plead guilty to auto theft with the understanding that a motion to dismiss to raise the issue of double jeopardy could be filed. The second count of the indictment was nolled. It is undisputed that the automobile involved in the Lake County charge and the automobile involved in the Cuyahoga County charge is the same vehicle. Appellant's motion to dismiss was overruled.

The appellant appeals the overruling of his motion to dismiss assigning the following error:

> "The trial court erred in overruling defendant's motion to withdraw plea and dismiss the indictment against him on the grounds of double jeopardy where the defendant had plead guilty and been convicted of operating a motor vehicle without the owner's consent in a municipal court under Ohio Rev. Code 4549.04(D) and the indictment charged automobile stealing under Ohio Rev. Code 4549.04(A) and both the affidavit in the municipal court and the indictment are based on the same act."

In *State of Ohio* v. *Best* (1975), 42 Ohio St. 2d 530, the Ohio Supreme Court stated that:

> "2. To sustain a plea of former jeopardy it must appear:
>
> (1) That there was a former prosecution in the same state for the same offense;
>
> (2) that the same person was in jeopardy on the first prosecution;
>
> (3) that the parties are identical in the two prosecutions; and
>
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar."

There is no dispute that the appellant was the person in jeopardy on the first prosecution or that the parties

are identical in the two prosecutions. The fact that the Lake County prosecution was brought in the name of the City of Wickliffe, and the Cuyahoga County prosecution was brought in the name of the State of Ohio does not defeat identity of parties. For purposes of double jeopardy, state and municipal governments are considered as a single sovereign. *Waller* v. *Florida* (1970), 397 U.S. 387, 25 L.Ed.2d 435; and *State of Ohio* vs. *Best, supra*. The real issue in this case is whether or not the Cuyahoga County prosecution is for the same offense that the appellant was convicted of in Lake County. The double jeopardy clause of the Fifth Amendment to the United States Constitution is a bar to a prosecution only if the defendant was previously prosecuted for the identical offense. *State* v. *Best, supra*.

Identity of offense consists of two components: (1) identity of the statutory offense and (2) identity of the operative act. A single act or transaction may violate more than one statutory provision. A prosecution for violation of one such provision will bar prosecutions under the other statutory provisions only if the other provisions proscribe the same offense. The Supreme Court of Ohio has stated the rule to be applied to determine if two distinct statutory provisions proscribe the same offense for purposes of double jeopardy:

> "The applicable rule under the Fifth Amendment is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (*Blockburger* v. *United States*, 284 U.S. 299, and *Duvall* v. *State*, 11 Ohio St. 657, followed.)" *State of Ohio* v. *Best, supra*.

In other words, two statutory offenses are the "same offense" for purposes of double jeopardy if proof of the elements of one of the offenses would support a conviction on the other offense or one offense is a lesser included offense of the other offense.

The appellant was charged in the Willoughby Municipal Court with violation of R.C. 4549.04(D), "No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner." In Cuyahoga County the appellant was charged with violation of R.C. 4549.04 (A), "No person shall steal any motor vehicle." Every element of the crime of operating a motor vehicle without the consent of the owner is also an element of the crime of auto theft. "The difference between the crime of stealing a motor vehicle, and operating a motor vehicle without the consent of the owner is that conviction for stealing requires proof of an intent on the part of the thief to *permanently* deprive the owner of possession." *State of Ohio* v. *Ikner* (C.A., Cuyahoga Cty., 1974, Case No. 33065), appeal to Ohio Supreme Court pending. Applying the rule laid down in *State of Ohio* v. *Best, supra.*, the crime of operating a motor vehicle without the consent of the owner is a lesser included offense of auto theft and both offenses are the same offense" for purposes of double jeopardy.

The appellee cites the case of *State* v. *Marcum* (C.A. Franklin Cty., 1969), 18 Ohio App.2d 190 to support their argument that operating a motor vehicle is not a lesser included offense of auto theft. The first syllabus of that case reads as follows:

> "1. The crime of operating a motor vehicle without the owner's consent . . . is not a lesser included offense of the crime of motor vehicle theft. . . ."

We do not find this case persuasive because the body of the opinion itself never discusses the issue of whether or not operating a motor vehicle without the owner's consent is a lesser included offense of auto theft. Also, the first paragraph of the court's opinion contradicts the courts' statement in the first syllabus.

> "The jury returned a verdict of 'not guilty to auto theft. They did find him guilty of a lesser included offense—operating a motor vehicle without the owner's consent." *State* v. *Marcum, supra.* at 191.

Since R.C. 4549.04(D) is a lesser included offense of R.C. 4549.04(A) appellant has established that for purposes of double jeopardy the two prosecutions involve the same statutory offense. To prevail on his double jeopardy argument, however the appellant must also show that the two prosecutions are premised on the same operative act. This, appellant has failed to do. The charge in Cuyahoga County arose out of a theft which occurred on November 29th in East Cleveland. The charge in Lake County arose out of the actions of the appellant in operating the car in Lake County on December 8th. The two prosecutions are based on two separate acts of the appellant, one which occurred on November 29th and one which occurred on December 8th. Since appellant has not shown that both prosecutions are based on the same act or transaction, the second prosecution is not barred by the double jeopardy clause.

Appellant also argues that the doctrine of "merger" precludes the imposition of separate sentences for violations of R.C. 4549.04(A) and R.C. 4549.04(D). The doctrine of "merger" precludes separate sentences on multiple convictions when the convictions are based upon the same act. *State* v. *Botta* (1971), 27 Ohio St. 2d 196; *State* v. *Ikner, supra.* As noted above, the two convictions were based on two distinct acts and not the same act; therefore, the doctrine of merger is inapplicable.

Appellant's assignment of error is not well taken. The judgment of the Court of Common Pleas is affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute a mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, P. J.,

MANOS, J.,

SILBERT, J., CONCUR.
(Silbert, J., Retired Judge of the Eighth
Appellate District, Sitting by Assignment)

/s/ John V. Corrigan
JOHN V. CORRIGAN
Presiding Judge

For plaintiff appellee: John T. Corrigan

For defendant appellant: Robert Otto Carson

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
CUYAHOGA COUNTY

[Emil J. Masgay, Clerk of Courts]

Court of Appeals No. 34316

Lower Court No. C.P. 12062-Cr.

Motion No. 31620

STATE OF OHIO, APPELLEE

vs.

NATHANIEL BROWN, APPELLANT

Date—December 31, 1975

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

[Received for Filing Dec. 31, 1975, Gerald R. Fuers.
By [Illegible], Dep.]

CORRIGAN, P. J.,

MANOS, J.,

SILBERT, J., CONCUR.
(Silbert, J., Retired Judge of the Eighth
Appellate District, Sitting by Assignment)

[Copies Mailed to Counsel for all Parties—Costs Taxed.]

/s/ John V. Corrigan
JOHN V. CORRIGAN
Presiding Judge

BOOK 61 PAGE 960

IN THE OHIO COURT OF APPEALS
CUYAHOGA COUNTY
EIGHTH DISTRICT

Case No. 34316

STATE OF OHIO, PLAINTIFF-APPELLEE

vs.

NATHANIEL BROWN, DEFENDANT-APPELLANT

Now comes the Defendant-appellant Nathaniel Brown and gives notice of appeal to the Supreme Court from the judgment entered in the Court of Appeals of Cuyahoga County, Eighth Appellate District, on the 31st day of December, 1975; that the case is one which did not originate in the Court of Appeals; and that the case involves a substantial constitutional question.

/s/ Robert Otto Carson
ROBERT OTTO CARSON
Attorney for Defendant-Appellant
9726 Park Heights
Garfield Hts., Ohio 44125
581-3737

PROOF OF SERVICE

I, Robert Otto Carson, certify that the above Notice of Appeal was served on John T. Corrigan, Prosecutor of Cuyahoga County, Ohio by mailing a copy to his office at 1560 East 21st Street, Cleveland, Ohio 44114, by ordinary U.S. mail, postage prepaid, this 27th day of January, 1976.

/s/ Robert Otto Carson
ROBERT OTTO CARSON
Attorney for Defendant-Appellant

THE SUPREME COURT OF THE STATE OF OHIO

1976 Term

To wit: March 19, 1976

No. 76-224

THE STATE OF OHIO,)
)
CITY OF COLUMBUS.)

THE STATE OF OHIO, APPELLEE

vs.

NATHANIEL BROWN, APPELLANT

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Robert Plautz.

THE SUPREME COURT OF OHIO

1976 Term

To wit: March 19, 1976

No. 76-224

THE STATE OF OHIO,)
)
CITY OF COLUMBUS.)

THE STATE OF OHIO, APPELLEE

vs.

NATHANIEL BROWN, APPELLANT

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

SUPREME COURT OF THE UNITED STATES

No. 75-6933

NATHANIEL BROWN, PETITIONER

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Ohio.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 18, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 224981 27

IN THE SUPREME COURT OF THE UNITED STATES

75-6933

OCTOBER TERM, 1975

NO. ~~75-6933~~ 75-

NATHANIEL BROWN

Petitioner

-vs-

THE STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

CHARLES R. LAURIE
Assistant Prosecuting Attorney
Attorneys for Respondent
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
(216)771-0660

ROBERT PLAUTZ, of counsel
GLENN BILLINGTON, Member of the Bar of the Supreme Court
Attorneys for Petitioner
1110 Euclid Avenue
Cleveland, Ohio 44115
(216)861-1104

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

NATHANIEL BROWN

Petitioner

-vs-

THE STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

QUESTIONS PRESENTED

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. The double jeopardy clause of the United States Constitution was not violated by the petitioner's convictions for operating an automobile without the consent of the owner and theft of the same automobile which occurred on different dates and in different counties.

STATEMENT OF THE CASE

On December 8, 1973 defendant, Nathaniel H. Brown, petitioner herein, was arrested and charged with operating a motor vehicle without the consent of the owner. On December 10, 1973 petitioner plead guilty to the charge, and was sentenced to a $100 fine and 30 days. While petitioner was incarcerated in the Lake County Workhouse, he was charged with the theft of the same automobile which occurred on November 29, 1973 in East Cleveland, Cuyahoga County, Ohio.

On February 5, 1974, the Grand Jury of Cuyahoga County indicted petitioner for auto theft pursuant to Ohio Revised Code, Section 4549.04(A). Petitioner was arraigned on February 26, 1974 and plead not guilty. Subsequently, on March 18, 1974 petitioner withdrew his not guilty plea and entered a plea of guilty with the understanding that petitioner could raise the issue of double jeopardy by means of a motion to withdraw guilty plea and dismiss indictment. On November 26, 1974, the trial court overruled the motion and placed petitioner on probation.

Petitioner appealed his conviction to the Ohio Eighth Judicial District Court of Appeals which affirmed the conviction finding that the Lake County and Cuyahoga County offenses were based upon two separate and distinct acts of the petitioner. (See pages 13-18 of the Appendix to Petitioner's Petition for a Writ of Certiorari).

Petitioner's appeal to the Ohio Supreme Court was dismissed on March 19, 1976 sua sponte for the reason that no substantial constitutional question existed.

REASONS FOR DENYING THE WRIT

1. The double jeopardy clause of the United States Constitution was not violated by the petitioner's convictions for operating an automobile without the consent of the owner and theft of the same automobile which occurred on different dates and in different counties.

Where the two prosecutions and convictions of the defendant were based upon two separate and distinct acts of said defendant, one of which occurred on November 29, 1973 and the other on December 8, 1973, the double jeopardy clause of the United States Constitution was not violated.

Petitioner's claim of double jeopardy is not supported by law or fact.

In State of Ohio v. Best (1975), 42 Ohio St. 2d 530, the Ohio Supreme Court stated that:

> "2. To sustain a plea of former jeopardy it must appear:
>
> (1) That there was a former prosecution in the same state for the same offense;
>
> (2) that the same person was in jeopardy on the first prosecution;
>
> (3) that the parties are identical in the two prosecutions; and
>
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar."

Identity of offense consists of two components: (1) Identity of the statutory offense and (2) identity of the operative act.

The charge in Cuyahoga County arose out of a theft which occurred on November 29th in East Cleveland. The charge in Lake County arose out of the actions of the petitioner in operating the automobile in Lake County on December 8th. For these reasons, both the Common Pleas Court and the Court of Appeals held that both prosecutions were not based on the same act or transaction. Therefore, the petitioner's claim that the Cuyahoga County charges were barred by the Fifth Amendment's prohibition against double jeopardy is not valid.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any questions of constitutional dimension justifying review by the Court. The petitioner for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: Charles R. Laurie

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Assistant Prosecuting Attorney
Attorneys for Respondent

PROOF OF SERVICE

I, JOHN T. CORRIGAN, Prosecuting Attorney for Cuyahoga County, Ohio, one of the Attorneys for the State of Ohio, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 9th day of July, 1976, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner's Attorneys, Robert Plautz and Glenn Billington, 1110 Euclid Avenue, Cleveland, Ohio, 44115 in a duly addressed envelope, with first class postage prepaid.

John T. Corrigan

Prosecuting Attorney of
Cuyahoga County, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6933

NATHANIEL BROWN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

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OPINIONS OF THE COURTS BELOW

The journal entry of the Ohio Court of Appeals, not published, along with its further journal entry overruling a motion for reconsideration, appear in the Appendix. The journal entry of the Supreme Court of Ohio denying further appellate review also appears in the Appendix.

JURISDICTION

The judgment of the Ohio Court of Appeals, Eighth Appellate District, was announced December 11, 1975, which judgment was entered on December 31, 1975, when a timely motion for reconsideration was overruled. The Supreme Court of Ohio denied further state appellate review on March 19, 1976. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(3) in that the rights, privileges and immunities under the United States Constitution have been violated.

QUESTION PRESENTED

Can the state charge and convict a defendant of stealing a certain motor vehicle when the state has already charged and convicted the same defendant of the lesser included offense of operating the same motor vehicle without the owner's consent and both charges grow out of the same act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ohio Revised Code:

§4549.04 Stealing motor vehicles.

(A) No person shall steal any motor vehicle.

(B) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner, and either remove it from this state, or keep possession of it for more than forty-eight hours.

(C) No person shall, with intent to defraud, hire a motor vehicle or operate or keep a motor vehicle which has been hired. It is prima-facie evidence of an intent to defraud if the offender does any of the following:

(1) Hires the motor vehicle by means of any false representation or by means of the unlawful use of a credit card;

(2) Hires the motor vehicle knowing he is without sufficient means to pay the hire;

(3) Absconds without paying the hire for the motor vehicle;

(4) Knowingly fails to pay the hire for the motor vehicle on its return, in the absence of a prior agreement for extended credit, without reasonable excuse for such failure;

(5) Knowingly fails to return the motor vehicle as required by the contract of hire, without reasonable excuse for such failure.

(D) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner.

(E) No person shall receive, buy, operate, conceal, or dispose of a motor vehicle that was obtained by means of an auto theft offense, knowing or having reasonable cause to believe it to have been so obtained.

STATEMENT

On December 8, 1973, Petitioner, Nathaniel Brown, was arrested in the City of Wickliffe, Lake County, Ohio, and charged with, *inter alia,* the offense of operating a motor vehicle without the owner's consent (hereafter "joyriding"), a violation of Ohio Rev. Code 4549.04(D), *repealed* 1/1/74. (Affidavit in the Willoughby Municipal Court) The affidavit alleged December 8th as the date of the offense and that the motor vehicle was owned by Gloria Ingram. Petitioner waived his right to counsel and to trial by jury and plead guilty to the charge on December 10th in the Willoughby Municipal Court. He was sentenced to thirty days in the Lake County Workhouse and fined $100.00 and costs. (Journal Entry in the Willoughby Court)

The following day, December 11th, while Petitioner was incarcerated in Lake County, he was charged by the City of East Cleveland, Cuyahoga County, Ohio, with the crime of stealing a motor vehicle, a violation of Ohio Rev. Code 4549.04(A), *repealed* 1/1/74. (Complaint in the East Cleveland Municipal Court) The complaint alleged November 29, 1973, as the date of the offense and that the automobile was owned by Gloria Ingram. The serial number of the automobile was the same as that alleged in the affidavit before the Willoughby Municipal Court.

On January 11, 1974, after his release from the Lake County Workhouse, Petitioner answered the charge in the East Cleveland Municipal Court and plead former jeopardy. After oral argument, the court denied the plea and bound Petitioner over to the Cuyahoga County grand jury. (Journal Entry in the East Cleveland Municipal Court)

On February 5, 1974, the Cuyahoga County grand jury returned an indictment against Petitioner charging

him with violation of Ohio Rev. Code 4549.04(A), auto theft, and with the lesser included offense of "joyriding," a violation of Ohio Rev. Code 4549.04(D). (Indictment in the Cuyahoga County Court of Common Pleas) The indictment alleged that the automobile was owned by Gloria Ingram. Both counts alleged November 29, 1973, as the date of the offense.

On March 18, 1974, a pretrial hearing was had in the Common Pleas Court of Cuyahoga County. The Defense informed the court that it wished to plead former jeopardy.[1] The trial court advised that it would accept a plea of guilty to the count charging violation of Ohio Rev. Code 4549.04(A) but would entertain a subsequent motion to withdraw the plea and have the indictment dismissed on the grounds of double jeopardy. The State acquiesced in the acceptance of the plea on those terms.[2] Petitioner entered a conditional plea of guilty, and the count charging violation of Ohio Rev. Code 4549.04(D) was *nolled.*

Petitioner subsequently filed a motion to withdraw his plea and have the indictment dismissed on the grounds of double jeopardy. The trial court overruled the motion on November 26, 1974, and sentenced Petitioner to six months in the Cuyahoga County Jail but suspended the sentence and placed Petitioner on probation for one year. (Journal Entries in Court of Common Pleas)

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[1] Petitioner did not plead former jeopardy at the time of his arraignment on February 19, 1974, for the reason that such plea at arraignment in Ohio is not permitted. *See* Author's Text, Ohio Crim R. 11 and 12.

[2] See Statement of Facts filed by the State in its brief in opposition in the trial court. Of course, Petitioner did not waive his right to assert the double jeopardy claim by pleading guilty. *Menna v. New York,* ____ U.S. ____, 46 L.Ed. 2d 195, 197 (1975); *Blackledge v. Perry,* 417 U.S. 21, 29-31, 40 L.Ed. 2d 628, 635-636 (1974).

Petitioner appealed his conviction to the Ohio Court of Appeals, Eighth Appellate District. The Ohio Court of Appeals affirmed the conviction, holding that because two different dates were alleged, the two convictions were premised on different acts. (Journal Entry of Court of Appeals, at 5)

Petitioner filed a timely motion for reconsideration, arguing that both charges were based on a continuous act and subject to but one prosecution. The Court of Appeals denied the motion. (Journal Entry of Court of Appeals)

Petitioner appealed to the Supreme Court of Ohio. On March 19th, 1976, the appeal was dismissed *sua sponte* for the stated reason that ". . . no substantial constitutional question exits herein."

ARGUMENT

Introduction

Often the issue in a claimed violation of the Double Jeopardy Clause is whether the two or more charges filed against the accused are the "same offense" within the meaning of the Fifth Amendment. In the instant case, the Ohio Court of Appeals held that the two charges were the same *in law* for the purposes of double jeopardy.[3] Yet because of *factual* allegations

[3]The Ohio Court of Appeals applied the *same evidence* test in determining whether the two charges constituted the same offense. The case most popularly associated with that test in this country is *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 309 (1932), although the standard was adopted by this Court prior to *Blockburger. See Garvieres v. United States*, 220 U.S. 338, 342, 55 L.Ed. 489, 490 (1911); *In re Nielsen*, 131 U.S. 176, 187-191, 33 L.Ed. 118, 122 (1889). Similarly, it was the law in Ohio eight years prior to *Blockburger. Duvall v. Ohio*, 111 Ohio St. 657, 665-666 (1924). Absent from the Ohio

(continued)

bottoming the charges against Petitioner, his claim was denied. Argument in this case will focus on how the Ohio Court of Appeals' interpretation of those factual allegations runs afoul of both the meaning of the phrase "same offense" and the purpose and policy of the Double Jeopardy Clause. Two alternative standards will be proposed to protect Petitioner's constitutional rights.

(footnote continued from preceding page)

Court of Appeals' decision is any discussion of Ohio Rev. Code 2941.25, effective 1/1/74, which seemingly rejects the *same evidence* test. *See Ohio v. Ikner*, 44 Ohio St. 2d 132, 136 (1975) (W. Brown, J. concurring).

The Ohio Court of Appeals held Ohio Rev. Code 4549.04(D) to be a lesser included offense to Ohio Rev. Code 4549.04(A). It is often stated that an exception to the *same evidence* test is where one offense is included in another, prosecution for one bars prosecution for the other. *E.g., Ashe v. Swenson*, 397 U.S. 436, 452 n. 4, 25 L.Ed. 2d 464, 480 n. 4 (1970) (Brennan, J. concurring); 65 Yale L.J. 339, 347 n. 43 (1956). Whether or not it is an exception depends on how the test is stated. If the test is stated as first formulated in the English case of *Vandercomb and Abbott*, 2 Leach C.C. 708, 720, 168 Eng. Rep. 455, 461 (1796), then it is only an exception if the lesser offense is charged subsequent to the greater offense. *See* Friedland, *Double Jeopardy*, p. 98 (1969). If, however, the test is stated as in *Blockburger*, then it is not an exception at all but is the test itself. *Blockburger* permits multiple prosecution only ". . . if *each* statute requires proof of an additional fact which the other does not." *Blockburger, supra* at U.S. 304, L.Ed. 309 (Emphasis added). In the instant case, *each* offense does not require an additional fact. The Ohio Court of Appeals held that "Every element of the crime of operating a motor vehicle without the consent of the owner is also an element of the crime of auto theft." Journal Entry, at 4. *See Garvieres v. United States, supra,* for an operational analysis of the test and *see also Waller v. Florida*, 397 U.S. 387, 390, 25 L.Ed.2d 435, 438 (1970), where prosecution for a lesser included offense barred prosecution for the greater.

I.

In *In re Snow*, 120 U.S. 274, 30 L. Ed. 658 (1887), this Court illustrated what the result could be if multiple counts were permitted for what is one continuous act. In *Snow*, petitioner was charged in three separate indictments with unlawful cohabitation with more than one woman. The indictments were returned by the same grand jury on the same day and charged cohabitation with the same seven women. Each indictment alleged a different period of a consecutive 35 month period. The Court held that petitioner could not be charged with three counts for what "... is inherently a continuous offense, having duration, and not an offense consisting of an isolated act." *Id.*, at U.S. 281, L. Ed. 661. The Court illustrated the danger in holding otherwise:

> The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so an *ad infinitum*, for smaller periods ... and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more. *Id.*, at U.S. 282, L. Ed. 662.

It is easy to dismiss the illustration in *Snow* as an absurdity stating only the obvious. But if there were any fears at the time of *Snow* that one continuous act could result in charges "*ad infinitum*," those fears should be reawakened by the instant case. Here a man is charged with two counts of larceny, albeit different

degrees, in connection with the reported theft of a single piece of property. The automobile was reported stolen and discovered nine days later in the possession of Petitioner. The State immediately charged Petitioner for what is commonly known as "joyriding."[4] The complaint alleged the date the car was discovered. After obtaining conviction for this charge, the State[5] then decided to charge Petitioner with auto theft alleging the date the car was first reported stolen. The Ohio Court of Appeals held that the second charge was proper because, "The two prosecutions are based on two separate acts of the appellant, one which occurred on November 29th and one which occurred on December 8th." Journal Entry, p. 5.

What the Ohio Court of Appeals failed to realize is the nature of larceny in connection with a single piece of property. The Ohio Supreme Court commenting on the crime of concealing stolen property has stated that it "... is a continuous act, as long as the property remains in control of the concealer, its continued control does not create new offenses from day to day...." *Ohio v. Smith*, 59 Ohio St. 350, 365 (1898) (*dicta*). The same rule should apply to the initial larceny. Larceny does not exist in a vacuum without the intent to keep the property, whatever the period of time intended. *See also Milanovich v. United States*, 365 U.S. 551, 558-559, 5 L. Ed.2d 773, 778 (1961) (Frankfurter, J. concurring).

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[4] *See* Legislative Service Commission Note to Ohio Rev. Code 2913.03, *eff.* 1/1/74; *Ohio Criminal Practice Manual*, 6th Ed., Text Sec. 53.14; Perkins, *Criminal Law*, 2d Ed. p. 273 (1969).

[5] In actuality it was two different municipalities in two different counties that charged Petitioner. The Ohio Court of Appeals explicitly stated that this was not determinative of the issue. Journal Entry, p. 2-3. *See Waller v. Florida*, 397 U.S. 387, 25 L.Ed.2d 435 (1970); and n. 8, *infra.*

Moreover, the crime of larceny requires the two distinct elements of trespassory taking *and* asportation. The later element requires a space dimension in order to complete it. *See* Perkins, *Criminal Law*, 2d Ed. pp. 263-265 (1969). This in turn necessarily requires some period of time in which to perform it. Once performed, the entire crime is consumated. In order for another larceny to be committed involving the same property, both elements of trespassory taking and asportation must again be committed. But it is impossible for a second trespassory taking to be committed as long as the first asportation continues. The element of trespassory taking requires taking from the owner. If the owner does not have possession, the element of trespassory taking can not be performed. Hence, one of the elements is missing and the crime cannot be committed. In the instant case, it has never been alleged that the automobile was returned to the owner between November 29 and December 8, 1973. It is therefore impossible for two larcenies to have been committed, one on November 29 and one on December 8, 1973.

All of this says nothing for a further principle violated by the results of this case–*i.e.*, the *same evidence* test, which, indeed, the Ohio Court of Appeals stated as follows. (*See* Journal Entry, p. 3) Whether or not that test is a matter of constitutional law and is incorporated, if at all, into either the Due Process or Double Jeopardy Clauses is unclear.[6] Significantly, however, no case, either state or federal, has been found holding that the *same evidence* test need not be

[6] *Compare*, Brennan, J., concurring in *Ashe v. Swenson*, 397 U.S., at 452-453, 25 L.Ed.2d, at 480; Burger, C. J., dissenting in *Ashe*, 397 U.S., at 463, 25 L.Ed.2d, at 486; and Douglas and Black, J. J., dissenting in *Gore v. United States*, 357 U.S., at 495-596, 26 L.Ed.2d, at 1412.

followed. Or, stated another way, no case has been found to allow convictions for both the lesser and greater offenses. (*See* n. 1, *supra*) and for very good reasons. The results would be horrendous. There would be convictions not only for the highest charge but for each lesser included charge as well, with the more dire consequence of consecutive sentencing. Even if the charges in the instant case are deemed to be based on different "operative acts," whatever that term is intended to mean, it cannot be denied that there was only one course of conduct with respect to the automobile. But as the Ohio Court of Appeals would have it, that course of conduct can be further split into two courses of conduct with respect to the greater and lesser offenses, each subject to being charged and tried separately, as long as neither covers the same period of time as the other. It is doubtful that the *same evidence* test can withstand such a strained interpretation. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 n. 4, 97 L.Ed. 260, n. 4 (1952), where the *same evidence* test applied to a course of conduct.

II.

The issue of how many convictions can be had for criminal behavior has been considered by this Court in the past. In reading some of these cases it is difficult to sense whether the holdings lie implicitly in due process, double jeopardy and/or legislative intent. In any event, the cases provide useful guideposts in fashioning a rule protecting Petitioner from two convictions at two

separate trials and the resulting consecutive sentencing for but one offense.[7]

[7]Petitioner is not alone in his need for protection. Nor is the need limited to those accused of larceny of a single piece of property. A survey of recent cases shows that there are other crimes in which the proper unit of prosecution is unresolved. These cases can roughly be devided into three groups. First, those in which the conduct of the accused remains, or at least appears to remain, relatively constant and indivisible throughout the period of time in question. *See, e.g., United States v. Jones*, (6th Cir.) 533 F.2d 1387, 1390-1392 (1976) (Possession of a firearm on three different days–one offense.); *Baldwin v. Wisconsin*, 62 Wisc. 2d 521, 525-526, 215 N.W.2d 541, 543 (1974) (False imprisonment–two offenses under the facts.); *New Jersey v. Witte*, 13 N.J. 598, 604-607, 100 A.2d 754, 756-758 (1953), *cert. denied* 347 U.S. 951, (Nonfeasance in office over a three year period–one offense.); *Connecticut v. Licari*, 132 Conn. 220, 43 A.2d 450 (1954) (Drunk driving is one offense over the distance driven but can have two counts of reckless operation over the same distance.). Second, those cases where the conduct is technically divisible but takes place within a short period of time and with the same motivation. *See, e.g., Illinois v. Smice*, 33 Ill. App. 3d 674, 676, 338 N.E.2d 213, 215 (1975) (Assaulting two officers with two blows–one offense); *Ex Parte Evans* (Ct. of Crim. App. Tex.) 530 S.W.2d 589, 591-592 (1975). *Compare Illinois v. Tate*, 37 Ill. App. 3d 358, 346 N.E.2d 79 (1976) *with Illinois v. Helton*, ____ Ill. App. 3d ____, 349 N.E.2d 508 (1976) *and Illinois v. Neal*, 37 Ill. App. 3d 713, 346 N.E.2d 178 (1976). Third, those cases where the conduct is also divisible but is repeated with regularity over a period of time and with the same *modus operandi*. *E.g., compare California v. Slocum*, 52 Cal. App. 3d 867, 888-890, 125 Calif. Rptr. 442, 454 (1976), *cert. denied*, ____ U.S. ____; *Pennsylvania v. Clark*, 238 Pa. Super. 444, ____, 357 A.2d 648, 650 (1976); *Wisconsin v. George*, 69 Wisc. 2d 92, 98-99, 230 N.W. 2d 253, 256-257 (1975); *Utah v. Dolon*, 28 Utah 2d 331, 502 P.2d 549 (1972).

All of the above cases are concerned with the proper unit of prosecution in relation to the time dimension in which the activity takes place. Another troublesome area for the proper unit of prosecution is where the act appears singular but the demonstrative evidence supporting conviction is divisible. *E.g., compare Illinois v. Tannahill*, 38 Ill. App. 3d 767, ____, 348

(continued)

Previously discussed was the case of *In re Snow*, 120 U.S. 273, 30 L. Ed. 658 (1887). There the Court considered the nature of the offense. It is "... inherently a continuous offense ..." *Id.*, U.S., at 281, L. Ed., at 661. In *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), the Court considered whether the act, or acts, giving rise to the offense are prompted by the same "impulses." In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 97 L. Ed. 260 (1952), thirty-two violations in connection with three provisions of the Fair Labor Standards Act involving different employees at different times were considered chargeable only as three offenses where there is a "singleness of thought, purpose or action, which may be deemed a single 'impulse'...." *Id.*, U.S., at 224, L. Ed., at 265.

Perhaps one of the most subtle holdings on the issue is the case of *Yates v. United States*, 365 U.S. 66, 2 L. Ed. 2d 95 (1957). The Court held that the refusal to answer eleven questions was chargeable only as one count of contempt where the witness "carved out an area of refusal, [and] remained within its boundaries...." *Id.*, U.S., at 73, L. Ed.2d, at 102.

The two conspiracy cases of *United States v. Kissel*, 218 U.S. 601, 54 L. Ed. 1168 (1910), and *Braverman v. United States*, 317 U.S. 49, 87 L. Ed. 3 (1942), are also helpful. Although the factual and legal issues are distinguishable from the instant case, they nonetheless

(footnote continued from preceding page)

N.E.2d 847, 853-854; *Florida v. Peavey*, (Fla. App.) 326 So.2d 461 (1976); *Oregon v. Jackson, III*, ____ Or. App. ____, 541 P.2d 541 (1975); *and McKinney v. Birmingham*, 52 Ala. App. 605, 608-609, 296 So.2d 197, 198-199 (1973), *cert. denied* 420 U.S. 950, (Query: Could each frame of a motion picture film constitute one count of exhibiting obscene motion picture films?) Fortunately, the instant case is concerned with only one piece of demonstrative evidence.

indicate that this Court will go beyond mere physical acts and look to the result intended by those acts. These cases recognize that certain criminal behavior is not always a "cinematographic series" of acts, each subject to separate conviction. *Kissel, supra*, at U.S. 607.

One case dealing with the issue of venue is also helpful if for no other reason than to attempt to give the law some symmetry on the issues of when, where, and, as it relates to the instant case, how many convictions can be had for one criminal act. In *United States v. Midstate Horticultural Company, Inc.*, 306 U.S. 161, 83 L. Ed. 563 (1939), this Court quoted a useful definition for a continuous offense:

> A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occur. *Id.*, U.S., at 166, L. Ed., at 567.

Other decisions by this Court have considered the issue of multiple convictions. Although they were not considered in relationship to a time dimension that the Ohio Court of Appeals gave to the instant case, they hold that when there is doubt as to the number of convictions that can be hand, the doubt is resolved in favor of lenity. *E.g., Heflin v. United States*, 358 U.S. 415, 419, 3 L. Ed.2d 407, 410 (1959); *Bell v. United States*, 349 U.S. 81, 83-84, 99 L. Ed. 905, 910 (1955). Among these cases, of particular importance is *Ladner v. United States*, 358 U.S. 169, 3 L. Ed.2d 199 (1958). There the Court considered the results of multiple convictions in terms of the punishment that could follow. *Id.*, U.S., at 177, L. Ed.2d, 205. In the instant case, to allow the Ohio Court of Appeals' decision to stand would subject Petitioner to punishment wholly disproportionate to his conduct.

All of the cases cited in this section indicate no bashfulness on the part of this Court in dealing with the sublties of human behavior as it relates to fairness in criminal prosecution. The instant case may be factually different, but it nonetheless calls upon this Court of invoke the same process. Petitioner's thoughts, motivation and conduct remained constant throughout his involvement with the automobile. Any attempt at splitting his relationship with the automobile simply for the purpose of obtaining multiple convictions at separate trials resulting in consecutive sentencing defies not only logic, but the constitution as well. It is nothing short of arbitrariness.

Therefore, this Court must hold that where a single piece of property is alleged to be the subject of a prosecution for larceny, the state can only charge one offense of larceny, irrespective of the period of time involved.

III.

Assuming *arguendo* that this Court holds larceny is not a continuous offense and that Petitioner can be charged with two or more offenses, his conviction must still be reversed as being in violation of his Fifth Amendment right against double jeopardy.

If the State wished to prosecute Petitioner for auto theft occurring on November 29th and joyriding occurring on December 8th, 1973, they should have done so at their first opportunity and at one trial. They had such an opportunity in the Willoughby Municipal Court in Lake County on December 8, 1973. That court had full subject matter and territorial jurisdiction to determine the charge of auto theft under Ohio Rev. Code 4549.04(A), notwithstanding the fact that the

crime was alleged to have occurred in Cuyahoga County, East Cleveland, Ohio. The State could have simply moved to bind Petitioner over to the Lake County grand jury. The Willoughby Court would have then held a hearing to determine probable cause on the auto theft charge. *See* Ohio Rev. Code 2931.23, *repealed* 1/1/74, and 2901.12(C), *eff.* 1/1/74, and Ohio Rev. Code 1901.20 and Ohio Crim. R. 5(B)(4)(a).[8]

Instead, after obtaining conviction for joyriding on December 10th in the Willoughby Court, the State filed a complaint in the East Cleveland Municipal Court. At the very moment the charge was filed the purpose and policy of the Double Jeopardy Clause was violated.

The purpose and policy of the Double Jeopardy was stated by this Court in *Green v. United States*, 355 U.S. 184, 187-188, 2 L. Ed.2d 199, 204 (1957):

> . . . the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[9]

The fact that the State can carve numerous offenses out of the period of time that a criminal episode lasts rationalizes very little in Petitioner's mind when looking at the Constitution. Obviously, he knows about criminal

[8] Ohio Rev. Code 2901.12(C) is intended to replace 2931.23. The new section does not contain the language of the old section that a conviction or acquittal in one county bars prosecution in another. In light of *Waller v. Florida*, 397 U.S. 387, 25 L. Ed.2d 435 (1970), the language would be superfluous. *See Ohio v. Shimman*, 122 Ohio St. 522, 525 (1930), where the holding of *Waller* was the law of Ohio forty years before *Waller*.

[9] *See also United States v. Wilson*, 420 U.S. 332, 343, 43 L. Ed.2d 232, 241 (1975).

responsibility, for he pled guilty in the Willoughby Court. But in terms of society's responsibility to him, all he knows about is one 1969 Chevrolet. As far as Petitioner knew on December 10, 1973, he was to serve thirty days in the Lake County Workhouse and the matter was to be over. But it was not over. The next day the State ganged up on him in another county and filed a complaint in the East Cleveland Court. Compounding the insecurity he felt upon being charged a second time is the fact that it extended well beyond the expiration of his first sentence. Petitioner was not afforded an opportunity to raise the double jeopardy issue until a preliminary hearing was held on the second charge after his release from the Lake County Workhouse. Under the Ohio Court of Appeals' decision, Petitioner, depending upon the whim of the prosecutor, could have faced a total of ten charges—each at a separate trial after having served a sentence imposed in an antecedent trial. The penalty provisions for "joyriding" are a maximum six-month term for the first offense and a maximum twenty-year term for each repeat offense. Ohio Rev. Code 4549.99(E).[10] Consequently, even if the State were satisfied with charging only the lesser offense of "joyriding" at each of the ten prosecutions, Petitioner would be subject to a total penalty of 180 years and six months in the state penitentiary.

repealed 1-1-74

To afford Petitioner at least the partial protection of knowning his total period of confinement at one time, this Court must adopt the rule advocated by writers,[10] the American Law Institute,[11] and the American Bar

[10] *E.g.*, Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L. J. 513, 534 *et seq.* (1949).

[11] ALI, Model Penal Code Sec. 1.07(2) (Official Draft, 1962).

Association's Special Committee on Minimum Standards for the Administration of Criminal Justice.[12] The rule is known as the *same transaction* test. As stated by the American Law Institute:

> Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.[13]

Arguments calling for adoption of the *same transaction* test usually point to the proliferation of modern penal statutes increasing the criminal liability for essentially one act.[14] If the need exists there, it surely exists in the instant case concerned essentially with common law larceny.

There is no protection for Petitioner other than the *same transaction* test. Assuming a defendant has the right in Ohio to move for joinder,[15] had Petitioner done

[12]ABA Standards, Joinder and Severance Sec. 1.3(b) and (c) (Approved Draft, 1968).

[13]Subsection (3) of the same section provides:

> When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order such charge to be tried separately, if it is satisfied that justice so requires.

[14]*E.g.*, the single sale of a quantity of illicit narcotics. *See Gore v. United States*, 357 U.S. 386, 2 L. Ed.2d 1405 (1958).

[15]*Compare* Ohio Crim. R. 13 *with* ABA Standards, Joinder and Severance Sec. 1.3(b) (Approved Draft, 1968) *and* ALI, Model Penal Code Sec. 1.07(2). Note especially under the ABA Standards the defendant must know of the other charges. Apparently the ABA Standards go farther than the Model Penal Code in that a subsequent prosecution is barred whether or not the prosecutor knows of the offenses.

so at the time of his uncounseled plea in the Willoughby Court it would have been a vain act. The charge in the East Cleveland Court had not even been filed, much less did Petitioner have notice of it. The Willoughby Court could not join something that did not exist. Nor could Petitioner invoke the doctrine of *collateral estoppel*[16] at the time of the hearing in the East Cleveland Court. First, under the Ohio Court of Appeals' decision, the two charges are based on different operative acts. Second, even if they are based on the same operative act, Petitioner pled guilty to the charge in the Willoughby Court, thereby conclusively establishing the elements of trespassory taking and asportation. The State can very easily use these two admitted elements at subsequent trials and tack on other elements. *See Abbate v. United States*, 359 U.S. 187, 200 n. 4, 3 L. Ed.2d 729 n. 4 (1959) (Brennan, J. concurring). Finally, Petitioner cannot argue an "implied acquittal" of any elements sought to be proved in the East Cleveland Court upon which he never faced jeopardy on in the Willoughby Court. *Price v. Georgia*, 398 U.S. 323, 328-329, 26 L. Ed.2d 300, 305 (1970).

The attractiveness of the *same transaction* test is that it does not do violence to the *same evidence* test.[17]

[16]*See Ashe v. Swenson*, 397 U.S. 436, 443-446, 25 L.Ed.2d 469, 475-477 (1970).

[17]*See* Ashe, *supra* at U.S. 460 n.14, L. Ed. 484 n.14 (Brennan, J. concurring). Note, *Criminal Law: The Same Offense in Oklahoma–Now You See It, Now You Don't*, 28 Okla. L. Rev. 131, 139-140 (1975).

Blockburger[18] and *Gore*[19] are left intact.[20] All the *same transaction* test says is that if the accused is going to be charged with criminal acts, all offenses proved by these acts must be joined in a single prosecution. If there is genuine prejudice to either party, a motion for severance can always be made. There is no reason why the measure of prejudice now needed to sustain such a motion should be any different under the *same transaction* rule. Moreover, the integrity and credibility of the criminal justice system would be markedly increased. The bizarre and conflicting results both in verdicts and ultimate punishment in such cases as *Ashe*,[21] *Ciucci v. Illinois*,[22] and *Williams v. Oklahoma*,[23] would be eliminated. Complementing this would be the assurance that subsequent prosecution, if necessary and

[18]284 U.S. 299, 76 L. Ed. 306 (1932).

[19]357 U.S. 386, 2 L. Ed.2d 1405 (1958).

[20]At the least, the *same evidence* test should be a floor to the constitution. The states are free, of course, to go beyond that test. Not discussed in the Ohio Court of Appeals decision is the apparent repudiation of the *same evidence* test in Ohio Rev. Code 2941.25, *eff.* 1/1/74. *See* n. 1, *supra. See Ohio v. Ikner*, 44 Ohio St.2d 132, 136 (1975) (W. Brown, J. concurring). At least three other states have gone beyond the *same evidence* test. Texas–*Duckett v. Texas*, (Ct. Crim. App.) 454 S.W.2d 755 (1970). California–West Ann. Penal Code Sec. 654. *See Burris v. California*, 43 Cal. App. 3d 530, 117 Cal Rptr. 898 (1974), were apparently the *same evidence* test is rejected in terms of punishment but not prosecution. New York–Of importance to defendants, New York has rejected the results of the test with respect to punishment. N.Y. Penal Law Sec. 70.25(2).

[21]397 U.S. 436, 25 L.Ed.2d 469 (1970).

[22]356 U.S. 571, 2 L.Ed.2d 983 (1958), rehearing denied 357 U.S. 924.

[23]358 U.S. 576, 3 L.Ed.2d 516 (1959).

proper, would be motivated by justice in the absence of even the appearance of vindictiveness.

Whether there are multiple crimes committed at the same or different time, society's interest is adequately protected under the *same transaction* rule. The proper penalty, or penalties, can be inflicted in proportion to the defendant's total criminal behavior–without delay occasioned by pending and untried indictments–to say nothing of the judicial time that is saved. Other interests are also present. Victims need not relive their trauma each time the prosecutor decides another jury should hear it. The guilty feel, and face, the full consequence of their conduct. The innocent sleep well. To borrow and paraphrase on Mr. Justice Black's often quoted analogy,[24] all the *same transaction* rule says is: The State can force the accused to run the gauntlet, but they must put all their clubmen along the path. None can lie in wait. If some miss their mark, so be it. There never was any assurance that the result would be different on another run.

[24]*Green v. United States*, 355 U.S. 184, 190, 2 L.Ed.2d 199, 206 (1957).

CONCLUSION

The decision and judgment of the Ohio Court of Appeals and that of the Supreme Court of Ohio must be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1976

No. 75-6933

NATHANIEL BROWN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether a municipal court conviction for the *misdemeanor* of operating a motor vehicle without the consent of the owner in one county and a subsequent conviction, in a different county, for the *felony* of auto theft, committed nine days earlier than the *misdemeanor* offense, places a defendant twice in jeopardy for identical offenses violating the "same evidence" test of the Double Jeopardy and Due Process Clauses of the Constitution of the United States?

II. Whether the Fifth Amendment Double Jeopardy Clause of the United States Constitution requires that the defendant be tried only once for all separate offenses arising from a course of criminal conduct which may form a single transaction?

STATEMENT OF THE CASE

On November 29, 1973 an automobile belonging to Gloria Ingram was stolen by Petitioner-Appellant, Na-

thaniel Brown, from a parking lot in *Cuyahoga County*, Ohio. Nine days later, on December 8, 1973, Brown was arrested in a different county of Ohio, Lake County, and charged with the misdemeanor of operating a motor vehicle without the owner's consent in violation of Ohio Revised Code, Section 4549.04(D) (repealed 1/1/74). Two days later, on December 10, 1973, Brown plead guilty to this misdemeanor offense in the Willoughby Municipal Court of *Lake County* and was immediately sentenced to thirty days in the Lake County Workhouse and fined $100 and costs. The record reveals no reason for the *Lake County* prosecuting authorities to contact the *Cuyahoga County* authorities with respect to Brown.[1] Neither does the record reveal any communication between the prosecuting authorities in *Lake County* and prosecuting authorities in *Cuyahoga County* concerning Brown or the motor vehicle in question.

On February 5, 1974, the *Cuyahoga County Grand Jury* indicted Brown charging him with the auto theft of Ingram's automobile on November 29, 1973, in violation of Ohio Revised Code, Section 4549.04(A). The vehicle involved in the *Cuyahoga County felony indictment for*

1. For example, if the record before this Court and before the Ohio Court of Appeals established that Brown himself was a resident of *Cuyahoga County* or that Brown frequently entered *Cuyahoga County*, then the record might establish reasonable grounds for the *Lake County* authorities to contact the *Cuyahoga County* authorities with respect to the arrest of Brown for operating Ingram's automobile without the owner's consent. Since there is no basis in the record, either before this Court or the Ohio Court of Appeals, to believe that the *Lake County* authorities should have reasonably foreseen a connection between their arrest of Brown and possible previous offenses by Brown in *Cuyahoga County*, this Court must conclude that the *Lake County* authorities acted reasonably and fairly by accepting Brown's plea of guilty to a misdemeanor without first communicating with the prosecuting authorities in *Cuyahoga County*. Compare, *Ciucci v. Illinois*, 356 U.S. 571, 573 (1958) (". . . material not being part of the record, and not having been considered by the State courts, may not be considered here.")

auto theft was the same vehicle implicated in Brown's misdemeanor conviction in *Lake County for operating a vehicle without the owner's consent.*

In the *Cuyahoga County* Common Pleas Court Brown plead guilty to the felony offense of auto theft, and his subsequent motion to withdraw this plea on grounds of double jeopardy was overruled on November 26, 1974. Brown was sentenced to six months in the Cuyahoga County Jail, his sentence was suspended, and he was placed on probation for one year.

Brown appealed his *Cuyahoga County felony conviction for auto theft* to the Ohio Court of Appeals, charging that his felony conviction violated the Constitutional prohibition against Double Jeopardy because it was based on the same acts which gave rise to his *prior misdemeanor conviction* in the *Lake County* Municipal Court. The Court of Appeals, employing the Double Jeopardy analysis enunciated in *Blockburger v. United States*, 284 U.S. 299 (1932),[2] and *State v. Best*, 42 Ohio St. 2d 530 (1975), affirmed Brown's conviction.

On March 19, 1976 the Supreme Court of Ohio, exercising its discretion under Ohio Law, denied Brown's petition for review, and the United States Supreme Court granted certiorari on October 18, 1976.

SUMMARY OF ARGUMENT

The State of Ohio urges this Court to find that a defendant who plead guilty to the misdemeanor of operating a motor vehicle without the consent of the owner in one county and was subsequently convicted in a different county for the felony of auto theft which was com-

2. See also, *Gavieres v. United States*, 220 U.S. 338, 342 (1911), and the decision of the Ohio Court of Appeals, Appendix page 21.

mitted nine days earlier than the misdemeanor offense does not place a defendant twice in jeopardy and does not violate the Double Jeopardy Clause of the Constitution of the United States. The Double Jeopardy Clause bars multiple prosecutions for the "same offense." This standard is measured by the same evidence test enunciated by this Court's decisions in *Gavieres v. United States*, 220 U.S. 338 (1911) and *Blockburger v. United States*, 284 U.S. 299 (1932). These decisions require that courts examine whether each statutory offense with which the defendant is charged "requires proof of a fact which the other does not." The State of Ohio maintains that the felony auto theft statute (4549.04(A)) requires proof of an additional fact which is not present in the misdemeanor of operating a stolen motor vehicle (4549.04(D)). The State of Ohio also maintains that the crimes of auto theft and operating a stolen motor vehicle do not constitute a continuous offense in violation of the Double Jeopardy Clause as construed by *In Re Snow*, 120 U.S. 274 (1887).

The State of Ohio further urges this Court not to adopt the same transaction test advocated by the Petitioner. The same transaction test is not recognized as the standard for applying the Fifth Amendment Double Jeopardy Clause, and does not furnish a manageable judicial standard for the application of the Fifth Amendment Double Jeopardy Clause. The same transaction rule will unnecessarily burden trial courts by requiring extensive pretrial hearings on factual issues unrelated to guilt determining and will plague Federal Courts in habeas proceedings on issues unrelated to guilt determining.

Finally, Petitioner's argument that he is subjected to potentially excessive sentences for multiple prosecutions does not raise a Double Jeopardy Claim and is more appropriately covered by the Eighth Amendment prohibition against disproportionate sentencing.

ARGUMENT

I. A MUNICIPAL COURT CONVICTION FOR THE MISDEMEANOR OF OPERATING A MOTOR VEHICLE WITHOUT THE CONSENT OF THE OWNER IN ONE COUNTY AND A SUBSEQUENT CONVICTION, IN A DIFFERENT COUNTY, FOR THE FELONY OF AUTO THEFT, COMMITTED NINE DAYS EARLIER THAN THE MISDEMEANOR OFFENSE, DOES NOT PLACE A DEFENDANT TWICE IN JEOPARDY FOR IDENTICAL OFFENSES VIOLATING THE "SAME EVIDENCE" TEST OF THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES OF THE CONSTITUTION OF THE UNITED STATES.

(A) The Double Jeopardy Clause Prohibits Multiple Prosecutions for the "Same Offense." This Standard Is Measured by the Same Evidence Test of Blockburger v. United States, 284 U.S. 299, 304 (1932); and Gavieres v. United States, 220 U.S. 338 (1911) Which Demands That Courts Examine Whether Each Statutory Offense With Which the Defendant Is Charged "Requires Proof of a Fact Which the Other Does Not." The Court's Application of the Same Evidence Test Must Focus on the Statutory Elements of Each Offense.

The protection of an accused individual in a criminal proceeding under the Double Jeopardy prohibition of the Fifth Amendment is firmly rooted in the traditions of Anglo-American jurisprudence, *Green v. United States*, 355 U.S. 184 (1957). It has been deemed fundamental to our system of justice by this Court and thus applicable to the States via the Due Process clause of the Fourteenth

Amendment, *Benton v. Maryland,* 395 U.S. 784 (1969). In *United States v. Wilson,* 420 U.S. 332, 342-43 (1975) this Court classified the protection furnished by the Constitutional Rule prohibiting double jeopardy:

> "In *North Carolina v. Pearce,* 395 U.S. 711 (1969) we observed that the Double Jeopardy Clause provides three related protections:
>
> " 'It protects against a second prosecution for the same offense *after acquittal.* It protects against a second prosecution for the *same offense after conviction.* And it protects against multiple punishments for the *same offense.*' *Id.,* at 717." (Emphasis added.)

Brown's double jeopardy claims fall into the second category recognized in *Wilson* and *Pearce, supra,* i.e., "a second prosecution for the same offense after *conviction.*" The *Wilson* Court candidly expressed the constitutional interest underlying this protection:

> "When a defendant has been *once convicted* and punished *for a particular crime,* principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the *same offense. Ex parte Lange,* 18 Wall. 163 (1874); *In re Nielsen,* 131 U.S. 176 (1889)." See *Wilson, supra,* at 343. (Emphasis added.)

The interest protected under the "*second prosecution for the same offense after conviction*" species of double jeopardy cases collides head on with the State's important legitimate interest in punishing each violation of its unique, discrete criminal statutes. Therefore the United States Supreme Court has carefully and responsibly limited the scope of this category of double jeopardy claims to situations where the second prosecution is for an offense which

is the *SAME* as the first offense for which the defendant was convicted.[3] This Court, throughout a distinguished history of Nineteenth and Twentieth Century Double Jeopardy Jurisprudence has repeatedly held that by "*SAME* offense," it means two statutory crimes, the elements of which were, on their face, *LEGALLY IDENTICAL* to each other. The seminal case, which has withstood almost fifty years of Double Jeopardy adjudication and specific assaults on its validity,[4] is *Blockburger v. United States,* 284 U.S.

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3. This approach is consistent with the limited scope of the text of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which pertinently provides:

> ". . . [N]or shall any person be subject for the *same offense* to be twice put in jeopardy."

4. In *Gore v. United States,* 357 U.S. 386 (1958) a federal defendant was convicted on six counts of violating three different sections of a federal law by a single sale of narcotics on two separate dates, two days apart. The defendant was sentenced to three consecutive terms for each day's sale, the prison terms for each day's sale were to run consecutively with those of the other day's sale. The High Court *rejected* the defendant's Double Jeopardy claim when it wrote:

> "We are strongly urged to reconsider *Blockburger* . . .
>
> . . . [W]e have had pressed upon us that the *Blockburger* doctrine offends the constitutional prohibition against double jeopardy. *If there is anything to this claim it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive* to the application of the historic safeguard of double jeopardy. In applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept like that of due process, a long course of adjudication in this Court carries impressive authority. Certainly if punishment for each of separate offenses as those for which the petitioner here has been sentenced, and not merely different descriptions of the same offense, is constitutionally beyond the power of Congress to impose, not only *Blockburger* but at least the following cases would also have to be overruled: *Carter v. McClaughry,* 183 U.S. 365; *Morgan v. Devine,* 237 U.S. 632; *Albrecht v. United States,* 273 U.S. 1; *Pinkerton v. United States,* 328 U.S. 640; *American Tobacco Co. v. United States,* 328 U.S. 781; *United States v. Michener,* 331 U.S. 789; *Pereira v. United States,* 347 U.S. 1." *Gore, supra* at 390, 392. (Emphasis added.)

299 (1932) in which this Court responsibly defined the term "same offense" when it wrote:

> "Each of the offenses created requires proof of a different element. The applicable rule is that *where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States,* 220 U.S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth,* 108 Mass. 433: A single act may be an offense against two statutues; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." See *Blockburger, supra,* at 304. (Emphasis added.)

In the earlier case of *Morgan v. Devine,* 237 U.S. 632 (1915) this Court, construing the meaning of the term "same offense" as it appears in the Double Jeopardy Clause of the Fifth Amendment wrote:

> "As to the contention of *double jeopardy* upon which the petition of habeas corpus is rested in this case, this court has settled that the *test of identity of offenses is whether the same evidence is required to sustain them*; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to *Carter v. McClaughry,* 183 U.S. 365; *Burton v. United States,* 202 U.S. 344, 377, and the recent case of *Gavieres v. United States,* 220 U.S. 338." See *Morgan, supra,* at 641. (Emphasis added.)[5]

In order for the violation of discrete statutes to constitute punishment for the "same offense" within the meaning of the Double Jeopardy Clause, the elements of the two offenses must be legally identical, on their faces.[6] Thus the Court wrote in *Gavieres v. United States,* 220 U.S. 338 (1911):

> "In *Burton v. United States,* 202 U.S. 344, 381, Bishop's Criminal Law, vol. 1, §1051, was quoted with approval to the effect 'jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.' In that case this court said, speaking of a plea of *autrefois acquit,* 'It must appear that the *offense charged,* using the words of

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5. See, *Carter, supra,* at 389; *Albrecht v. United States,* 273 U.S. 1, 11 (1927); *American Tobacco Co. v. United States,* 328 U.S. 781, 787-89 (1946); *Pinkerton v. United States,* 328 U.S. 640, 643-44 (1946); *Pereira v. United States,* 347 U.S. 1, 11-12 (1954).

6. The Ohio Court of Appeals applied the same evidence analysis to determine the merits of Brown's double jeopardy assertion. This test, which follows *Blockburger, supra,* is employed by Ohio Courts, *Duvall v. State,* 111 Ohio St. 657 (1924); *State v. Best,* 42 Ohio St. 2d 530 (1975). The Court of Appeals pointed out that Brown needed to prove that the two convictions were premised on the same operative acts and that the prior conviction was for the identical offenses as the latter (citing *State v. Best, supra*). Specifically, it outlined what appellant-petitioner need prove.

> "2. To sustain a plea of former jeopardy it must appear:
>
> (1) That there was a former prosecution in the same state for the *same offense*;
>
> (2) that the same person was in jeopardy on the first prosecution;
>
> (3) that the parties are identical in the two prosecutions; and
>
> (4) that the particular offense, on the prosecution of which the jeopardy attached, was such an offense as to constitute a bar." (Emphasis added.)

> Chief Justice Shaw, "*was the same in law and in fact.* The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" ' " See *Gavieres, supra,* at 343. (Emphasis added in part.)

Likewise, Mr. Justice Powell, writing for the majority affirming the defendant's conviction in *Iannelli v. United States,* 420 U.S. 770 (1975) stated:

> "The test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain 'whether each provision requires proof of a fact which the other does not.' Id., at 304. As *Blockburger* and other decisions applying its principle reveal, see, e. g., *Gore v. United States,* 357 U.S. 386 (1958); *American Tobacco Co. v. United States,* 328 US 781, 788-789 (1946), *the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied notwithstanding a substantial overlap in the proof offered to establish the crimes."* See *Iannelli, supra,* at 785, fn. 17. (Emphasis added.) Contrast the *dissenting* opinion of Mr. Justice Douglas, arguing that the Double Jeopardy Clause was violated.

In Brown's case, the two statutes under which he was convicted define crimes, the elements of which are legally distinct on their faces. Ohio Revised Code,

§4549.04(D) (misdemeanor), the first statute under which Brown was convicted, states:

> "No person shall purposely take, operate, or keep any motor vehicle without the consent of the owner."

The elements of this misdemeanor offense are:[7]

(1) Purposely

(2) Operating

(3) A Motor Vehicle

(4) Without the Owner's Consent.

Ohio Revised Code §4549.04(A) (felony), the second statute under which Brown was convicted states:

> "No person shall steal any motor vehicle."

The elements of this felony offense are:[8]

(1) Steal (i.e. taking with the intent to permanently deprive the owner of possession)

(2) A Motor Vehicle.

Assuming that the misdemeanor statute (§4549.04(D), Ohio Revised Code) requires that the defendant "know" that he does not have the consent of the owner,[9] that

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7. BALDWIN'S OHIO CRIMINAL LAW, 6th Ed., 1973 Cumulative Service [i.e. pocket part supplement] page 36. Venue, which the State must always establish under Ohio law, has been omitted.

8. *Id.* at 36.

9. The text of the misdemeanor statute (Section 4549.04 (D)) permits a construction which requires no bad intent on the part of the defendant, and triggers liability if the defendant "purposely . . . operates" another's automobile, regardless of his scienter with respect to the true owner's consent. Ohio Courts have not passed on the quality of the scienter element contained in the misdemeanor statute. Obviously, if Section 4549.04(D) is read to contain *no scienter*, and thus trigger strict liability, it certainly delineates a crime different from the *felony* offense of Section 4549.04(A), which *contains* the scienter element of stealing, i.e. the intent to deprive the true owner of possession permanently.

intent differs from the intent element of the felony theft statute (§4549.04(A), Ohio Revised Code). With respect to the misdemeanor offense (§4549.04(D), Ohio Revised Code) "[t]here is no requirement of knowledge that the vehicle was stolen in order to convict," see *State v. Ikner*, 44 Ohio St. 2d 132, 134 (1975). However, the intent element of the felony theft statute (§4549.04(A), Ohio Revised Code) requires that the defendant himself intend "to *permanently* deprive the owner of possession," See *State v. Brown*, Decision of the Ohio Court of Appeals, Case No. 34316 (Cuyahoga, December 11, 1975), Appendix 22.[10]

For example, under the bare language of the misdemeanor statute, the State establishes the elements of the misdemeanor (§4549.04(D), Ohio Revised Code), operating a motor vehicle without the owner's consent, if the evidence shows that a defendant borrowed a stolen car from a thief, and operated it, knowing only that he [the defendant] was *not* authorized to operate it by the actual owner, and despite the fact that the defendant has no knowledge that the thief stole the auto.[11] Although such evidence establishes the elements of the misdemeanor statute (§4549.04(D), Ohio Revised Code), it certainly

---

10. There is substantial doubt that the Ohio Supreme Court would hold that the misdemeanor of operating an auto without the owner's consent is a lesser included offense, and therefore an identical offense, of the felony of auto theft. See *State v. Ikner*, 44 Ohio St. 2d 132, 134 (1975), and cases cited in the State of Ohio's Brief *infra* at footnotes 12, 14. Should the United States Supreme Court, in Brown's case, conclude that Ohio law controls regarding whether the misdemeanor is a lesser included offense of the felony, then it should remand Brown's case to the Ohio Supreme Court to determine this question of Ohio law. Compare *Waller v. Florida*, 397 U.S. 387, 390, footnote, 1, 395, *on remand* 270 So. 2d 26, 28-29 (Florida, 1973), *cert. den.* 414 U.S. 945 (1973).

11. As indicated in the text, the defendant need not know that the vehicle was stolen in order to be guilty of the misdemeanor of operating the vehicle without the owner's consent. See *Ikner, supra* at 134.

does not satisfy the elements of the felony of auto stealing (§4549.04(A), Ohio Revised Code). A defendant who receives custody of property from a thief, when the thief voluntarily relinquishes such custody to the defendant, does not intend to "permanently" deprive the actual owner of possession. In fact, such a defendant may receive custody from the thief with the intent to operate the auto without the consent of the owner, and after several days, when the defendant first learns that the auto is stolen, return it to the true owner. Therefore, on the face of the two statutes, the legal quality of the intent elements differs between the misdemeanor (§4549.04(D), Ohio Revised Code) and the felony (§4549.04(A), Ohio Revised Code) statutes. However, this is not the only distinguishing feature between the legal elements of the two statutes.

The felony statute (§4549.04(A), Ohio Revised Code) requires that the defendant *physicially steal*, i.e. take with the intent of depriving the owner of possession permanently, whereas the misdemeanor statute (§4549.04(D), Ohio Revised Code), requires that the defendant *operate* the auto without the owner's consent. A defendant certainly may *steal* an automobile without *operating* it. For example, he may *steal* the car in violation of (§4549.04(A)) by using a truck to tow it away from the owner's driveway. Such a theft, without operating the car, i.e. sitting inside, turning the ignition, and touching the accelerator, could never result in a conviction for *operating* the automobile without the owner's consent in violation of (§4549.04(D), Ohio Revised Code).

Thus, the legal elements of the misdemeanor and felony statutes differ, on their faces, in two regards. *First*, the characteristics of the intent elements differ, the misdemeanor predicating liability on the intent to use without

the owner's consent, irrespective of the intended duration of such use, and the felony predicating liability on the intent to withhold possession from the owner *permanently*. *Second*, the conduct prohibited by each statute differs, the misdemeanor predicating liability only on "*operation*" of the vehicle, whereas the felony predicates liability on the physical *taking* of the auto, irrespective of whether the vehicle is ever operated.

Under the test which this Court expressed in *Gavieres v. United States*, 220 U.S. 338 (1911) each statutory offense on its face, requires different proof of at least one fact which is not required by the other statutory offense and therefore the two statutes do not prohibit the "same offense" within the meaning of the Double Jeopardy Clause. The *Gavieres* Court stated at 342:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but *whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.*" (Emphasis added.)

From the discussion above, it is obvious that the intent element, on the face of each statute, requires "proof of an additional fact which the other does not." The misdemeanor is established by proof that the defendant received custody of the auto from a thief and operated it, knowing

that the true owner did not consent to the defendant's operation, but these additional facts could not establish the elements of the felony of auto theft. Likewise, the felony of auto theft is established by proof that the defendant used a truck to tow the auto away from the victim's custody, but these additional facts could not establish the elements of the misdemeanor of *operating* an auto without the owner's consent.

(B) Prosecution and Conviction for a Lesser Included Offense Does Not Bar Subsequent Prosecution for the Greater Offense Under the "Same Evidence" Test of Blockburger v. United States, 284 U.S. 299, 304 (1932); Gavieres v. United States, 220 U.S. 338, 342-43 (1911).

In his brief at page 7, footnote 3, Brown makes the overbroad assertion that, "prosecution for a lesser included offense barred prosecution for the greater," citing *Waller v. Florida*, 397 U.S. 387, 390 (1970). See also, *Ashe v. Swenson*, 397 U.S. 436, 452, footnote 4 (Brennan concurring) (citing *no* opinion by any court as authority). Brown argues that his second conviction for the felony offense constitutes Double Jeopardy under a chimerical "exception" to the "same evidence rule," because the Ohio Court of Appeals held that the misdemeanor of operating a car without the owner's consent (§4549.04(D), Ohio Revised Code) is a lesser included offense of the felony of auto stealing (§4549.04(A), Ohio Revised Code). Compare *Ashe, supra,* at footnote 4 (Brennan concurring).

Assuming that the misdemeanor of operating an auto without the owner's consent is a lesser included offense under Ohio Law, an assumption which the Respondent

rejects,[12] convictions for such an offense do not bar prosecution for the greater offense. A greater offense is distinguished from a lesser included offense because the greater offense contains all of the elements of the lesser *plus*, one or more additional elements not located in the lesser offense. Thus the distinction between the greater and lesser offenses fits exactly outside the classical definition of the same evidence test articulated in *Gavieres, supra* at 342:

> "A single act may be an offense against two statutes; and if each statute requires proof *of an additional fact which the other does not*. . . [a] *conviction* under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis added.)

Even Justice Brennan concedes that ". . . where one offense is included in another . . . the evidence necessary to prove the two offenses is different." See *Ashe, supra,* footnote 4 (Brennan concurring).[13] Therefore, under the *Gavieres*

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12. Several Ohio cases have held that the misdemeanor of operating an auto without the owner's consent is *not* a lesser included offense of theft of an auto. See *Hoop v. State*, 26 Ohio L. Abs. 598, 599-600 (Montgomery County Court of Appeals, 1938); *State v. Marcum*, 18 Ohio App. 2d 190, 192 (Franklin County Court of Appeals, 1969); Compare *State v. Ikner*, 44 Ohio St. 2d 132, 134 (1975) (Holding that the misdemeanor of operation of a motor vehicle without the owner's consent is *not* a lesser included offense of the felony of concealing a stolen motor vehicle.)

13. In *Ashe, supra,* at footnote 4, Mr. Justice Brennan stated, in toto:

> "Several subsidiary rules have been developed in attempts to eliminate anomalies resulting from the 'same evidence' test. Thus, *where one offense is included in another, prosecution for one bars reprosecution for the other even though the evidence necessary to prove the two offenses is different.* Similarly, doctrines of *res judicata* and collateral estoppel have provided some, though not very much, relief

(Footnote continued on following page)

test Brown's prosecution for a lesser included offense, followed by a prosecution for the greater offense, cannot constitute a redundant prosecution for the "same offense" because the greater offense requires proof of a fact (i.e. the element which separates the greater offense from the lesser offense) which is not litigated in the first trial.[14] The State of Ohio concedes that had Brown been tried for the lesser offense first, and *acquitted,* then although the "same evidence" Double Jeopardy test of *Gavieres* would permit his retrial for the greater offense, such a result would be interdicted by operation of the *collateral estoppel* Double Jeopardy Rule enunciated after *Gavieres,* in *Ashe v. Swenson,* 397 U.S. 436, 445-47 (1970). However, the *Ashe* qualifications of the *Gavieres* "same evidence" test furnishes no aid to Brown who was *convicted* on the first charge. Significantly counsel for Petitioner Brown concedes that the *Ashe* doctrine furnishes no support for his client:

(Continued from previous page)

> from the extreme permissiveness of the test. See generally Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L. J. 513 (1949). Numerous practical exceptions to the test are discussed in Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805 (1937). So many exceptions to the 'same evidence' rule have been found necessary that it is hardly a rule at all; yet the numerous exceptions have not succeeded in wholly preventing prosecutorial abuse."

Justice Brennan offers no judicial, precedential authority for the position he adopts.

14. See the Ohio definition of the distinction between greater offenses and their lesser included offenses in *State v. Hereno,* 162 Ohio St. 193, 196-97 (1954):

> "Where the elements of another offense are not included among those of the offense charged in the indictment, the defendant cannot be found guilty of such other offense under the indictment. However, if certain but not all the elements of the offense charged in the indictment constitute in themselves an offense, then such offense is a lesser included offense."

"Nor could Petitioner invoke the doctrine of *collateral estoppel* at the time of the hearing in the East Cleveland Court. First, under the Ohio Court of Appeals' decision, the *two charges are based on different operative acts.* Second, even if they are based on the same operative act, Petitioner pled guilty to the charge in the Willoughby Court, thereby conclusively establishing the elements of trespassory taking and asportation. The State can very easily use these two admitted elements at subsequent trials and tack on other elements. *See Abbate v. United States,* 359 U.S. 187, 200 n. 4, 3 L. Ed.2d 729 n. 4 (1959) (Brennan, J. concurring). Finally, Petitioner cannot argue an implied acquittal of any elements sought to be proved in the East Cleveland Court upon which he never faced jeopardy on in the Willoughby Court. *Price v. Georgia,* 398 U.S. 323, 328-329, 26 L. Ed.2d 300, 305 (1970)." See Petitioner Brown's Brief at 19, and footnote 16. (Emphasis added in part.)

Brown's reliance on *Waller v. Florida,* 397 U.S. 387 (1970), is equally misplaced. *Waller* was not a case where the United States Supreme Court held that an initial conviction for a lesser included offense precluded a subsequent trial on the greater offense. The issue in *Waller* was whether a Florida Municipality and the State of Florida constituted separate sovereigns permitting serial prosecutions for an "identical offense." The *Waller* Court expressly qualified its holding on the State Court's assumption that both statutes punished identical crimes. In *Waller* the United States Supreme Court wrote:

> "We act on the statement of the District Court [of Florida] of Appeal that the second trial on the felony charge by information 'was based on the same

> acts of the appellant as were involved in the violation of the two city ordinances' and on the assumption that the ordinance violations were included offenses of the felony charge. Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one State to place petitioner on trial for the same alleged crime." See *Waller, supra* at 390 and also footnote 1 at 390.

The *Waller* Court, holding that the two political subdivisions constituted one sovereign, vacated the state court's judgment and remanded the case, for a conclusive determination of whether the two offenses were identical. See *Waller, supra,* at 395. Consequently, on remand, the District Court of Appeal of Florida, Second District, held that the two statutes were *not identical.* See, *Waller v. Florida,* 270 So. 2d 26, 28-29 (1973), *cert. den.* 414 U.S. 945 (1973) (Brennan, Douglas, Marshall dissenting on denial of cert.).

Therefore, prosecution and conviction for a lesser included offense does *not* bar subsequent prosecution for the greater offense under the "same evidence" test of *Blockburger* and *Gavieres, supra.*

(C) Petitioner Brown's Serial Convictions for the Separate Misdemeanor Offense (Ohio Revised Code §4549.04(D)), of Operating a Motor Vehicle Without the Owner's Consent, and the Felony Offense (Ohio Revised Code §4549.04(A)) of Auto Theft Do Not Constitute Multiple Convictions for Identical, Inherently "Continuous Offenses" in Violation of the Double Jeopardy Clause as Construed by in Re Snow, 120 U.S. 274, 281 (1887).

Petitioner Brown argues that his second prosecution for the felony offense of auto theft (§4549.04(A), Ohio Revised Code) constitutes a fragmented prosecution for separate periods of time during "an inherently continuous offense," in violation of the Double Jeopardy Clause as construed by *In Re Snow*, 120 U.S. 274, 281 (1887). Brown contends that the felony offense of auto theft continued throughout the nine days between November 29, 1973, the day he stole the auto, and December 8, 1973, the day he was arrested for the misdemeanor of operating an auto without the owner's consent.

First, Brown offers no Ohio authority for the novel theory that auto stealing is a "continuous" offense. See Petitioner Brown's Brief, pages 9-11. His only Ohio authority consists of a flimsy analogy based on the Ohio Supreme Court's recognition that the crime of *concealing stolen property* is a continuous act as long as the property remains in control of the concealer. See *Ohio v. Smith*, 59 Ohio St. 350, 365 (1898) (*dicta*). The fact that concealing stolen property is a continuous offense has no bearing on the question of whether theft of an automobile is a continuous offense under Ohio law. If this Court "constitutionalizes" the Ohio law question of when an offense is "continuous", and determines that theft is a "continuous" offense, triggering the Double Jeopardy implications which

attach through *In Re Snow, supra*, this Court will adversely affect State-Federal comity by opening the door to numerous federal habeas corpus actions where state convicts throughout the country will seek release under the Double Jeopardy Clause, by arguing that their multiple theft convictions in State courts comprised serial convictions for "one continuous" theft offense. Such a deleterious intrusion into state administration of criminal justice is inconsistent with this Court's recent decision in *Stone v. Powell*, ... U.S. ....., ..., 49 L.Ed.2d 1067, 1088 (1976). Significantly, the cases cited by Brown, in which this Court has previously construed multiple convictions to be "continuous" for Double Jeopardy Clause purposes were cases arising *solely under federal law*, where the question of Federal-State comity was obviously not present. See *In Re Snow*, 120 U.S. 274, 276 (1887) (Proceedings in the Federal District Court for the "Territory of Utah"); *Milanovich v. United States*, 365 U.S. 551, 552, 558-59 (1961) (Frankfurter, concurring) (Theft and Receiving Stolen Property under 18 U.S.C. Section 641 constitutes one continuous offense); *United States v. Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221-226, footnote 4 (1952) (Section 15 of the Fair Labor Standards Act penalizes a course of conduct, and not each separate breach of the statutory duty owed to an employee during any workweek). The State of Ohio urges this Court not to intrude into a domain properly reserved to state courts by "constitutionalizing" the question of whether a State theft crime constitutes a "continuous offense" in the absence of an authoritative state court decision on that question.

Furthermore, the Respondent urges that the elements of the felony of auto theft (§4549.04(A), Ohio Revised Code) delineate a crime which is terminated once the defendant takes the auto with the intent to permanently deprive the owner of possession. While the person who

has stolen the auto must be deemed to continuously control or conceal it, see *Ohio v. Smith, supra,* at 365, such a thief need not be logically deemed to have "operated" the vehicle continuously for nine days thereafter, especially since, as discussed in the Respondent's Brief, *supra,* at Part I(A), a defendant may logically steal an auto without *ever* operating it.

Lastly, the Respondent notes that *In Re Snow, supra,* has no bearing on the factual web which ensnares Brown. In *In Re Snow,* this Court struck down multiple convictions, for *identical* conduct, i.e., cohabiting with several women in violation of 22 Stat. 31 (1882), on the theory that, under federal law, each infraction of the same statute occurred in a continuous period of time. See *In Re Snow, supra,* at 281-83; see also, *Ebeling v. Morgan,* 237 U.S. 625, 630 (1915); and *Blockburger v. United States,* 284 U.S. 299, 301-303 (1932) where this Court wrote:

"The contention on behalf of petitioner is that these two sales, having been made to the same purchaser and following each other with *no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold,* constitute a single continuing offense. *The contention is unsound.* The distinction between the transactions here involved and an offense continuous in its character, is well settled, as was pointed out by this court in the case of *In re Snow,* 120 U.S. 274. There it was held that the offense of cohabiting with more than one woman, created by the Act of March 22, 1882, c. 47, 22 Stat. 31, was a continuous offense, and was committed, in the sense of the statute, where there was a living or dwelling together as husband and wife. The court said (pp. 281, 286):

'It is, inherently, a continuous offence, having duration; and not an offence consisting of an isolated act.

* * * * *

'A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character, like the one at bar, and a case where the statute is aimed at an offence that can be committed *uno ictu.*'

The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth. Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' *Wharton's Criminal Law,* 11th ed., § 34. Or, as stated in note 3 to that section, 'The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty.'

In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain. The question is controlled, not by the *Snow* case, but by such cases as that of *Ebeling v. Morgan,* 237 U.S. 625. There the accused was convicted under several counts of a willful tearing, etc., of mail bags, with

intent to rob. The court (p. 628) stated the question to be, 'whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense or of additional offenses because of each successive cutting with the criminal intent charged.' Answering this question, the court after quoting the statute, § 189, Criminal Code (U.S.C., Title 18, § 312), said (p. 629):

> 'These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag.'

See also *In re Henry*, 123 U.S. 372, 374; *In re De Bara*, 179 U.S. 316, 320; *Badders v. United States*, 240 U.S. 391, 394; *Wilkes v. Dinsman*, 7 How. 89, 127; *United States v. Daugherty*, 269 U.S. 360; *Queen v. Scott*, 4 Best & S. (Q.B.) 368, 373."

If the multiple violations of the identical illegal sales involved in *Blockburger, supra,* and the identical illegal mailbag tearings involved in *Ebeling, supra,* escaped classifications as "continuous" offenses, certainly the two offenses, occurring nine days apart, for which Brown was convicted, i.e., the *felony* of auto theft, and the *misdemeanor* of operating an auto without the owner's consent,

must be treated as *DIS*-continuous offenses under *In Re Snow*; especially in light of the fact that the two crimes for which Brown was convicted contained *different* elements, as opposed to the absolutely *identical* crimes which the *Snow* Court treated as "continuous". See Respondent's Brief, *supra*, at Part I(A).[15]

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15. Petitioner Brown, on page 12 of his Brief, footnote 7 refers this Court to a series of cases. An examination of these decisions reveals that they are not helpful to the precise issue confronting this Court. For example: *United States v. Jones*, 533 F.2d 1387 (6th Cir., 1976) (Court construed 18 U.S.C.A. App. Sec. 1202(a) and determined that Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm); *Baldwin v. Wisconsin*, 62 Wisc. 2d 521, 215 N.W.2d 541 (1974) (Facts of case supported two separate false imprisonment offenses); *New Jersey v. Witte*, 15 N.J. 598, 100 A.2d 754 (1953), *cert. denied* 347 U.S. 951 (Amendment of the indictment did not create new and separate offenses for keeping of a disorderly house over a three year period); *Connecticut v. Licari*, 132 Conn. 220, 43 A.2d 450 (1954) (Driving while intoxicated one offense); *Illinois v. Smice*, 33 Ill. App. 3d 674, 338 N.E.2d 213 (1975) (Since attack on two police officers were not independently motivated, it constituted one offense); *Ex Parte Evans*, 530 S.W.2d 589 (1975) (Sequence of time continuous); *Illinois v. Tate*, 37 Ill. App. 3d 358, 346 N.E.2d 79 (1976) (Simultaneous deviate sex acts constituted one crime); *Illinois v. Helton*, ... Ill. App. 3d ....., 349 N.E.2d 508 (1976) (Defendant's intent would support additional crimes); *Illinois v. Neal*, 37 Ill. App. 3d 713, 346 N.E.2d 178 (1976) (Convictions for kidnapping and rape of victim several hours later was determined to be two offenses); *California v. Slocum*, 52 Cal. App. 3d 867, 125 Cal. Rptr. 442 (1976), *cert. denied* ..... U.S. ..... (Whether a series of wrongful acts under California law constitutes a single offense is dependent upon facts of a particular case); *Pennsylvania v. Clark*, 238 Pa. Super. 444, 357 A.2d 648 (1976) (No double jeopardy raised, the issue in this case being whether doctrine of merger precluded the crimes of solicitation and bribery); *Wisconsin v. George*, 69 Wisc. 2d 92, 230 N.W.2d 253 (1975) (Pursuant to a Wisconsin Statute, an individual can be charged with one continuous offense of commercial gambling or individual offenses at election of state); *Utah v. Dolan*, 28 Utah 2d 331, 502 P.2d 549 (1972) (Construing Utah's statute on bad checks); *Illinois v. Tannahill*, 38 Ill. App. 3d 767, 348 N.E.2d 847 (1976) (Sale of obscene materials on different dates constitute separate offenses, no double jeopardy raised); *Florida v. Peavey*, 326 So. 2d 461 (1976) (Where prior information charging defendant with possession of marijuana based on search of automobile was dismissed, a second prosecution was not precluded

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II. THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT THE DEFENDANT BE TRIED ONLY ONCE FOR ALL SEPARATE OFFENSES ARISING FROM A COURSE OF CRIMINAL CONDUCT WHICH MAY FORM A SINGLE TRANSACTION.

(A) The Same Transaction Test Is Not Recognized as the Standard for Applying the Fifth Amendment Double Jeopardy Clause.

Petitioner Brown states his thesis urging this Court to "constitutionalize" the same transaction theory of the Double Jeopardy Clause when he quotes the American Law Institute (hereinafter A.L.I.) for the proposition that double jeopardy attaches when a defendant is subject:

> ". . . to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." See Petitioner Brown's Brief at page 18, quoting from the Model Penal Code (U.L.A.) §1.07 (2) (1974).[16]

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where possession of marijuana charge was based on search of defendant's *home*); *Oregon v. Jackson,* ..... Ore. App. ....., 541 P.2d 1072 (1975) (One crime where accused delivered two forged warranty deeds *simultaneously* to a county clerk for recording); and *McKinney v. Birmingham,* 52 Ala. App. 605, 296 So. 2d 197 (1973) (Plea of former jeopardy unavailable to defendant charged with exhibition of obscene films on separate dates where films were not precisely the same in law and fact).

16. In his Brief at page 20, footnote 20, Petitioner Brown suggests that the Ohio Supreme Court, as a matter of Ohio law, rejected the "same evidence" test, presumably in favor of a compulsory joinder species of the same transaction test, in *State*

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The A.L.I.'s Double Jeopardy rule improperly balances the competing interests aroused by Petitioner Brown's Double Jeopardy claim. The criminal defendants' interest protected under the "second prosecution for the

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v. Ikner, 44 Ohio St. 2d 132 (1975). This speculation is premised upon the concurring opinion by Justice Brown. Petitioner's reliance on this argument is slight for a very good reason, Justice Brown's analysis of Ohio Revised Code, Section 2941.25 is simply wrong.

In reference to the then new code section Justice Brown states, ". . . since the General Assembly has determined that an accused cannot be convicted for multiple counts arising out of the same transaction", *Ikner, supra,* at 136. Ohio Revised Code, Section 2941.25 reads as follows:

> §2941.25 Multiple counts.
>
> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information *may* contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information *may contain* counts for all such offenses, and the defendant may be convicted of all of them. (Emphasis added.)

This is an allowance for *permissive joinder* in Ohio Criminal proceedings, it is not a requirement for mandatory joinder. A compelled same transaction analysis is not the law in Ohio as Justice Brown's concurring opinion would lead one to believe. *Further, the syllabus, which in Ohio, states the holding of the case, follows Blockburger v. United States,* 284 U.S. 299 (1932).

In the same footnote Petitioner Brown suggests that New York has rejected, in part, the same evidence test under state law. The correct statement of the status of this Double Jeopardy test in New York was recited in *Cousins v. Maryland,* 354 A.2d 825, 830-31 footnote 3 (Md. Ct. Appeals, 1976), *cert. denied* 45 U.S.L.W. 3429, Case No. 76-339 (December 13, 1976).

> "New York has a statutory double jeopardy provision which prohibits successive prosecutions with several broad exceptions such as where each offense contains an element which the other does not and each statutory provision is designed to prevent a different harm or evil. N.Y.Crim.Pro.L.

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same offense after conviction"[17] species of double jeopardy cases collides head on with the State's important legitimate interest in punishing each violation of its unique, discrete criminal statutes.[18] Consequently most jurisdictions reject attempts to intrude the same transaction test into Fifth Amendment Double Jeopardy and Due Process analysis, as well as rejecting this theory under state law.

In *Cousins v. Maryland*, 354 A.2d 825 (Md. Ct. App., 1976), *cert. den.* ..... U.S. ....., 45 U.S.L.W. 3429, Case No. 76-339 (December 13, 1976), the defendant urged the Court to adopt the same transaction Double Jeopardy test. Defendant was approached by two retail store guards, Marilyn Neal and Ronald Wood, and accused of shoplifting several leather coats which Cousins had in his possession outside the store. When Neal and Wood approached Cousins, he drew a knife, pointed it directly at officer Neal, threatened her, and escaped. *Cousins, supra,* at 827. A warrant was sworn out against Cousins, charging him with shoplifting, and assault upon both Neal and Wood. Cousins was arrested and charged with two counts of larceny, two counts of shoplifting, two counts of receiving stolen property, one count of assault on Marilyn Neal, and one count of carrying openly a weapon with intent to injure. *Cousins, supra* at 827-28. The trial court proceeded *only* on the charge, in the warrant, of assault upon Wood,

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§ 40.20(2). *See Abraham v. Justices of New York, Etc.*, 43 A.D.2d 414, 352 N.Y.S.2d 451 (1974). *This is essentially the same as the required evidence test.* Multiple prosecutions may be barred, however, as a matter of state constitutional law if the record dicloses harassment. *Nolan v. Court of General Sessions of County of N. Y.*, 11 N.Y.2d 114, 227 N.Y.S.2d 1, 181 N.E.2d 751, 753 (1962)."

17. See *United States v. Wilson*, 420 U.S. 332, 343 (1975), and the State of Ohio's Brief *supra* at Part I(A).

18. See State of Ohio's Brief *supra* at Part I(A).

and acquitted him of this charge. Cousins then moved to dismiss the whole indictment on the ground that his acquittal, under the same transaction theory of the Double Jeopardy Clause precluded trial on the remaining counts in the indictment, because they arose from a single criminal episode.[19] The Maryland Court framed the Double Jeopardy issue:

> "In this case we are presented with the question of whether successive trials on charges arising from what is claimed to be the same criminal transaction are prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution . . . ." *Cousin's supra,* at 827.

In rejecting Cousin's same transaction theory of the Federal Constitutional Double Jeopardy provision, the court exhaustively analyzed the history of the same transaction doctrine in American jurisprudence.

> . . . "for Traditionally, the 'same evidence' or 'required evidence' test has been the standard for determining whether different statutory offenses are to be deemed the same for double jeopardy purposes. If each offense requires proof of a fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or criminal episode. Only where one offense requires proof of a fact not required by the other, or where neither offense requires proof of an additional fact, are the offenses deemed the same for

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19. *Cousins, supra,* at 833-34, also dealt with the issue of Double Jeopardy-Collateral Estoppel, because Cousins, unlike Petitioner Brown in the case currently before this Court, was acquitted at his first trial. See, *Ashe v. Swenson,* 397 U.S. 436, 445-47 (1970).

double jeopardy purposes, with successive prosecutions and multiple punishments being prohibited. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Gavieres v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911); . . . .

The required evidence test as used in multiple prosecution situations was challenged by Mr. Justice Brennan in a separate opinion in *Abbate v. United States*, 359 U.S. 187, 196-201, 79 S.Ct. 666, 671-674, 3 L.Ed.2d 729, 735-738 (1959), in which he also delivered the opinion of the Court, and in a concurring opinion in *Ashe v. Swenson, supra*, 397 U.S. at 448-461, 90 S.Ct. 1189, 1197 as failing to satisfy the underlying principles of the Fifth Amendment's double jeopardy clause. Noting that one of the purposes of the double jeopardy clause was to prohibit the state from repeatedly attempting to convict an individual 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,' Mr. Justice Brennan concluded 'that successive . . . prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under . . . statutes requiring different evidence and protecting different . . . interests.' *Abbate v. United States, supra*, 359 U.S. at 199, 197, 79 S.Ct. at 672. He proposed that the prosecution be required to join at one trial all charges arising out of a single criminal act or episode, *Ashe v. Swenson, supra*, 397 U.S. at 453-454, 90 S.Ct. at 1199:

> 'In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This "same transaction" test of "same offence" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience. Modern rules of criminal and civil procedure reflect this recognition.'

Despite the constitutional dimensions of the same transaction test proposed by Mr. Justice Brennan, it is in essence a compulsory joinder provision. Certain exceptions would be permitted. Joinder would not be required where the state, after diligent investigation, did not discover the second offense, or where no single court had jurisdiction over all offenses, or where joinder would be prejudicial to either the state or the accused, 397 U.S. at 453 n. 7, 455 n. 11, 90 S.Ct. 1189. Moreover, the same transaction test would not be used to define the meaning of 'same offense' in the Fifth Amendment for all purposes; it would only compel the prosecution to join all offenses arising from a single criminal act, episode or transaction in a single trial. Thus, the required evidence test apparently would still be used by Mr. Justice Brennan to determine whether separate statutory offenses tried in a single action were the same for double jeopardy purposes so as to prohibit multiple punishments from being imposed. *Ashe v. Swenson, supra*, 397 U.S. at 460 n. 14, 90 S.Ct. 1189; *Abbate v. United States, supra*, 359 U.S. at 198, 79 S.Ct. 666.

* * * * *

The majority of states, . . . have not adopted the same transaction test but have continued to apply the required evidence test for defining whether two offenses are the same for double jeopardy purposes. For cases rejecting the same transaction test, *see, e. g., Martinez v. People,* 174 Colo. 365, 484 P.2d 792, 794-795 (1971); *Hampton v. State,* 304 So.2d 498, 499-500 (Fla.App.1974); *State v. Tanton,* 88 N.M. 333, 540 P.2d 813, 816 (1975); *State v. Cobb,* 18 N.C.App. 221, 196 S.E.2d 521, 523-524 (1973); *Kupiec v. State,* 493 P.2d 444, 446 (Okl.Cr.App.1972); *State v. Pickering,* S.D., 225 N.W.2d 98, 100-101 (1975); *Jones v. State,* 514 S.W.2d 255, 256 (Tex.Cr.App.1974); *State v. Elbaum,* 54 Wis.2d 213, 194 N.W.2d 660, 663-664 (1972); *see also Kuklis v. Commonwealth,* 361 Mass. 302, 280 N.E.2d 155, 158-159 (1972).

. . . [T]he *same transaction standard . . . has not been applied as a federal constitutional requirement.* In *Morgan v. Devine,* 237 U.S. 632, 641, 35 S.Ct. 712, 59 L.Ed. 1153 (1915), *the Supreme Court rejected the contention that the identity of offenses for double jeopardy purposes is based upon the criminal act or occurrence rather than the elements of each separate offense alleged,* stating (237 U.S. at 641, 35 S.Ct. at 715):

> '. . . this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.'

See Carter v. McClaughry, 183 U.S. 365, 394-395, 22 S.Ct. 181, 46 L.Ed. 236 (1902). And in *Gavieres v. United States, supra,* 220 U.S. at 341, 342, 31 S.Ct.

421, 422, the Court emphasized that multiple prosecutions are barred by the double jeopardy clause only when the offenses charged in both prosecutions are the same under the required evidence test:

> 'It is to be observed that the protection intended and specifically given is against second jeopardy for the *same offense*. . . .
>
> * * * * *
>
> 'It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of the opinion that while the transaction charged is the same in each case, the offenses are different.'

Applying the required evidence test, the Court found that the offenses charged in each prosecution were different and that, therefore, the second prosecution was not barred by the first." See *Cousins, supra* at 829-831. (Emphasis added in part.)

The *Cousins* Court noted that the lower Federal Courts have rejected the same transaction doctrine:

> "The lower federal courts have declined to adopt the same transaction test in cases involving multiple prosecutions in view of the Supreme Court's reluctance to do so, applying instead the required evidence test. In *United States v. Wilder,* 150 U.S.App. D.C. 172, 463 F.2d 1263 (1972), the court held that successive prosecutions for failing to register a firearm and for possession of a firearm without a license did not violate the double jeopardy clause. Both charges arose from

the defendant's possession of the firearm, and the court, applying the required evidence test, found that the offenses were not the same. The Court went on to reject the defendant's double jeopardy claim that since both offenses arose from the same act, only one prosecution was constitutionally permissible. *The court specifically noted that the Supreme Court had not adopted the same transaction test advocated by Mr. Justice Brennan,* 463 F.2d at 1266 n. 9. *See also United States v. Cala,* 521 F.2d 605, 607 (2d Cir. 1975); *Bell v. State of Kansas,* 452 F.2d 783, 792 (10th Cir. 1971), *cert. denied,* 406 U.S. 974, 92 S.Ct. 2421, 32 L.Ed.2d 674 (1972); *Hattaway v. United States,* 399 F.2d 431, 432-433 (5th Cir. 1968)." *Cousins, supra* at 831-832. (Emphasis added.)

Thus the Maryland Court, following the holdings of both the United States Supreme Court,[20] and the lower federal courts, uncategorically repudiated the same trans-

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20. In his separate opinion in *Abbate v. United States,* 359 U.S. 187 (1959) Mr. Justice Brennan states ". . . [N]either this 'same evidence' test nor a 'separate interests' test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses *at one trial.*" *Abbate, supra* at 198 (Brennan, J.) (Emphasis added). However, in footnote 2 Justice Brennan grudgingly admits that *Gavieres v. United States,* 220 U.S. 338 (1911) does not fit his overbroad generalization.

> "*Gavieres v. United States,* 220 U.S. 338, upheld a prosecution for insulting a public officer *despite a prior prosecution* for indecent behavior in public based on essentially the same acts. However, that decision was an interpretation of a congressional statute against double jeopardy applicable to the Philippine Islands, a territory 'with long-established legal procedures that were alien to the common law.'" See *Abbate, supra,* at 198, footnote 2.

Justice Brennan's *confinement* of *Gavieres* to statutory construction is erroneous. The *Gavieres* Court wrote:

> "Section 5 of the act of Congress of July 1, 1902, 32 Stat., c. 1369, 691, provides: 'No person, for the same offense, shall be twice put in jeopardy of punishment.'
>
> *(Footnote continued on following page)*

action test for the application of the Double Jeopardy Clause to multiple prosecution cases.

> "The appellant in the instant case urges us to interpret the Fifth Amendment guarantee against double jeopardy as embodying the same transaction test in multiple trial situations. However, we are not free to do so. We are bound by the Supreme Court's holding that multiple prosecutions are barred under the double jeopardy clause only for offenses which are the same under the required evidence test." *Cousins, supra,* at 832.

Therefore, the overwhelming weight of American jurisprudence rejects the principle that the United States Constitution mandates that Double Jeopardy be assessed under the same transaction standard urged by Petitioner Brown.

(B) The Same Transaction Theory Furnishes No Manageable Judicial Standards for the Application of the Fifth Amendment Double Jeopardy Clause.

The *same transaction* theory does not furnish courts with a manageable judicial standard for application of the Double Jeopardy Clause. As stated by John Lobur

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(Continued from previous page)

> This statute was before this court in the case of *Kepner v. United States,* 195 U.S. 100, and it was there held that *the protection against double jeopardy* therein provided had, by means of this statute, *been carried to the Philippine Islands in the sense and in the meaning which it had obtained under the Constitution and laws of the United States.*" See *Gavieres, supra,* at 341. (Emphasis added.)

The *Cousins* Court *supra* at 831, footnote 4 wrote:

> "*Gavieres* involved a statutory double jeopardy prohibition applicable to the Philippine Islands, but the Court stated that the statute had the same meaning as the constitutional protection against double jeopardy, 220 U.S. at 341, 31 S.Ct. 421. And *see Kepner v. United States,* 195 U.S. 100, 121-124, 24 S.Ct. 797, 49 L.Ed. 114 (1904)."

in a WAYNE LAW REVIEW article criticizing the same transaction doctrine:

> "*When will all . . . acts be part of the same transaction*? When viewed together, the very terms *'act' and 'transaction' seem to defy separate definition.* If a 'single intent' is the factor which ties together several acts and makes them all part of the same transaction, pretrial determinations of an individual's state of mind would be necessary. Finding the single intent would, however, be speculative at best. The requirement of a single intent would also cause confusion in situations involving the same facts as the princpal case but occurring in a different sequence. For example, if defendant had first kidnapped his victim, then raped her (thus fulfilling his 'single intent' of having intercourse with her), and, as an afterthought, beat her, could the assault be said to have been done with the 'single intent' of having intercourse?" *Criminal Procedure—The Same Transaction Test—Is It Really Double Jeopardy?*, 20 WAYNE L. REV. 1377, 1378 (1974). (Emphasis added.) *See also*, Comment, *Twice In Jeopardy*, 75 YALE L. JOURNAL 262, 276 (1965).[21]

21. *See also*, 20 WAYNE LAW REVIEW 1377, 1378, footnote 6.

"Reprosecution and multiple punishment will be barred if the defendant's conduct constituted a single act or transaction, or was motivated by a single intent. The principal shortcoming of this approach is that any sequence of conduct can be defined as an 'act' or a 'transaction.' An act or transaction test itself determines nothing . . . Whether any span of conduct is an act depends entirely upon the verb in the question we ask. A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying the lather to one's face an act? . . . Yes, yes, yes.

. . . And since the term 'transaction' is equally chameleonic, it is not shocking that in Georgia, a so-called transaction state, two offenses do not constitute one transaction unless the offenses are the same in law and fact. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 276 (1965) (footnote omitted)"

The American Law Institute's proposal, relied on by Petitioner Brown, does not furnish Courts with a manageable judicial standard for delineating the outer boundaries of a single transaction, and therefore it does not suitably clarify the inherent ambiguity in the "same transaction" theory of the Double Jeopardy Clause. The A.L.I.'s standard is *vague* because it is based on words "arising from the same criminal episode." Who knows what a criminal episode is? Furthermore, the standard purports to be limited by a restriction that the multiple offenses within the episode must be known to the prosecuting authority at the time of commencement of the first trial. The State of Ohio recognizes that for purposes of double jeopardy, political subdivisions of a single state compose one sovereign.[22] However, the distinction between political subdivisions of the State, in Brown's case, the distinction between Lake County's Willoughby Municipal Court and Cuyahoga County's Grand Jury, has serious implication for the determination of whether an initial prosecuting authority has knowledge of all offenses which may be embraced within a particular criminal episode.

The record in this case contains no evidence that the Lake County prosecuting authorities, at the time Brown was initially convicted for the misdemeanor of operating a vehicle without the owner's consent, had the slightest reason to believe that Brown had committed the felony of auto theft by entering the different jurisdiction of Cuyahoga County and stealing an auto there.[23] The record certainly does not indicate that the Lake County authorities had reason to believe that Brown resided in Cuyahoga County, or that he ever visited that county. Assuming

22. See, *Waller v. Florida*, 397 U.S. 387, 395 (1970).

23. See discussion in the State of Ohio's Brief at footnote 1 *supra*.

that the Lake County authorities knew that the auto was stolen nine days before the day Brown plead guilty in the Lake County Municipal Court[24] there is nothing in the record which would put the Lake County authorities on notice that Brown entered Cuyahoga County, or any other county, and stole the automobile. Presumably relying on the single sovereign doctrine of *Waller v. Florida*, 397 U.S. 387, 395 (1970), Petitioner Brown urges this Court to infer that the Lake County authorities knew of Brown's prior misdeeds in Cuyahoga County nine days before his conviction in Lake County. Thus Petitioner Brown argues:

> "If the State wished to prosecute Petitioner for auto theft occurring on November 29th and joyriding occurring on December 8th, 1973, they should have done so at their first opportunity and at one trial. They had such an opportunity in the Willoughby Municipal Court in Lake County on December 8, 1973." Petitioner Brown's Brief, page 15.

If this Court permits the *Waller* doctrine to trigger *inferred knowledge* on the part of an initial prosecuting authority of each individual criminal act, which arguably comprises a single continuous transaction, when the different individual crimes are committed in multiple political subdivisions of a single state, then frequently states will be precluded from punishing serious violations of their criminal statutes merely because the initial prosecuting authority expeditiously tried the defendant for the last criminal act without searching the State to establish the conceptual time and space parameters within which the crime occurred.

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24. An assumption which is nowhere documented in the record.

For example, a defendant could commit vehicular homicide in front of a police officer walking a beat, who took the defendant's license number in Cuyahoga County, Ohio. The defendant could then speed away from the scene of the death, into Lake County, and there receive a speeding ticket fifteen minutes after the death. Under the A.L.I.'s rule, as applied by Petitioner Brown, such a defendant could quickly plead guilty to speeding in a Lake County Court and claim immunity from prosecution for vehicular homicide on the ground that he was speeding in Lake County in order to escape detection by the Cuyahoga County authorities. He would then argue that his Lake County speeding conviction was within the same transaction as the vehicular homicide. Such a defendant would then urge that the "State" should have proceeded against him at one trial because its political subdivisions constitute a single sovereign for Double Jeopardy purposes, *Waller, supra*, and therefore, the sovereign state, as the appropriate prosecuting authority, knew of *both* offenses at the time of the first conviction.

The State of Ohio respectfully suggests that the Double Jeopardy Clause is not designed to generate the type of immunity which logically flows from the application of the same transaction theory to legitimate, serial prosecutions for unique offenses which are limited by the fortuity of space or time.[25] See *Ashe v. Swenson*, 397 U.S. 436, 468-70 (1970) (Chief Justice Burger dissenting).

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25. Of course, it is possible to read the A.L.I. rule to protect defendants from subsequent prosecutions *only* when the initial "prosecuting officer" knows of the prior crimes within the single transaction. This approach might avoid the problems which the single sovereign doctrine of *Waller* cause for the A.L.I. rule. However, such an approach to the A.L.I. rule furnishes no protection to Brown since the "prosecuting officer" in Lake County, absent an inference of knowledge based on the *Waller* doctrine, could have no idea what prior offenses Brown had committed in Cuyahoga County at the time Brown plead guilty in Lake County.

(C) The American Law Institute's Same Transaction Rule Unnecessarily Burdens Trial Courts by Requiring Extensive Pre-Trial Hearings on Factual Issues Which Are Unrelated to Determinations of Factual Guilt, and Will Further Plague Federal Courts in Habeas Corpus Proceedings on Issues Unrelated to Determinations of Factual Guilt.

Under the A.L.I.'s same transaction rule the determination of what constitutes a criminal episode that was *known* to the initial charging authority requires a factual determination by the trial court in the second trial of what facts the initial charging authority had when it prosecuted the defendant in the first trial. This factual determination can be made only by imposing an onerous burden on States to conduct pre-trial hearings in order to fathom the propriety of a second trial which is arguably concerned with the same criminal episode that was the subject of some prior litigation. See 20 WAYNE L. REV. 1377, 1378 (1974). A pre-trial hearing on issues unrelated to the validity of guilt determining, would thus be necessitated at all second trials, similar to the burdensome pre-trial factual inquiries currently mandated under *Mapp v. Ohio*, 367 U.S. 643 (1961). The record does not show any factual determination in Petitioner Brown's case, because the State has not been afforded the opportunity to show what facts were within the grasp of the initial charging authority. Therefore, if this Court adopts the A.L.I.'s single transaction Double Jeopardy rule in Brown's case it must make one of two additional procedural rulings:

(1) Remand for hearing. Also determine what the burden of proof in such a hearing should be, and who has the burden of proof in such a hearing; or

(2) Deny the Petitioner's double jeopardy claim because Brown has not carried his burden to cultivate a record of the facts that were within the grasp of the initial charging authorities in this case; i.e., the Lake County authorities.

The pre-trial hearing procedures which flow *a fortiori* from the A.L.I.'s same transaction rule (i.e., §1.07(2)), will plague the federal judiciary with relitigation of factual matters, unrelated to guilt determinations, in collateral attacks in Federal Habeas Corpus. Such an approach to the administration of criminal justice burdens federal-state comity, and has been severely criticized in recent years,[26]

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26. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Chief Justice Burger dissenting), the Chief Justice criticized the *Mapp* rule when he wrote:

> "For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (dictum). This rule was extended to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961). The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.
>
> The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:
>
> > "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People v. Defore*, 242 N. Y. 13, 21, 23-24, 150 N. E. 585, 587, 588 (1926).
>
> The plurality opinion in *Irvine v. California*, 347 U.S. 128, 136 (1954), catalogued the doctrine's defects:
>
> > "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its

(Footnote continued on following page)

and conflicts with the recent trend in this Court limiting state prisoner's use to Federal Habeas Corpus to reverse their convictions on factual grounds unrelated to the validity of guilt determining.[27]

(D) The Eighth Amendment Protection Against Cruel and Unusual Punishment Shields Defendants From Excessively Severe Sentences Which May Inflict Disproportionate Punishment for a Course of Criminal Conduct.

Petitioner Brown argues that if this Court does not adopt the A.L.I.'s same transaction rule then he:

> ". . . depending upon the whim of the prosecutor, could have faced a total of ten charges—each at a separate trial after having served a sentence imposed in an antecedent trial. The penalty provisions for 'joyriding' are a maximum six-month term for the first offense and a maximum twenty-year term for each repeat offense. Ohio Rev. Code 4549.99(E). Consequently, even if the State were satisfied with charging only

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> remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches." *Bivens, supra* at 412-413.

Ultimately the Chief Justice says that he rejects the *Mapp* type approach to the administration of criminal justice. See *Stone v. Powell*, ... U.S. ....., ..., 49 L.Ed.2d 1067, 1091 (1976) (Chief Justice Burger, Concurring). Obviously the pre-trial hearings and factual determinations necessitated by the A.L.I.'s §1.07(2) rule cannot be justified on the theory that they deter initial prosecuting authorities from quickly trying defendants without thoroughly investigating the scope of the whole transaction of related crimes. We can expect law enforcement officers to make such inquiries with or without a same transaction rule.

27. See *Stone v. Powell*, ... U.S. ....., ..., 49 L.Ed.2d 1067, 1084, 1088 (1976).

> the lesser offense of 'joyriding' at each of the ten prosecutions, Petitioner would be subject to a total penalty of 180 years and six months in the state penitentiary.
>
> To afford Petitioner at least the partial protection of knowing his total period of confinement at one time, this Court must adopt the rule advocated by writers, the American Law Institute. . ." Petitioner Brown's Brief at 17.

Referring in part to the potentially disproportionate sentencing to which he is exposed, Brown concludes that, "[t]here is no protection for Petitioner other than the *same transaction* test." Petitioner Brown's Brief at 18.

However, Brown exaggerates the potential disporportionate punishment and unfair treatment to which he is exposed. He was not treated arbitrarily,[28] or sentenced

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28. Brown's case is not a situation where a prosecutor sought repetitive reprosecution on one charge in an effort to achieve the penalty he feels is proper. The second trial was not a matter of a prosecutor playing his "ace in the hole" after an unsatisfactory verdict nor do we find criminal prosecution employed as a means to harass the accused or inflict unnecessary suffering. The inconvenience of the second trial on the theft charge is granted, but harassment is not synonymous with inconvenience.

The Court is confronted with a conviction of an individual on two different offenses as defined by the Ohio Legislature. The interest of the people of Ohio in the enforcement of their criminal laws would be ill-served were the instant case to be governed by a strained analogy to a situation where an overzealous prosecutor seeks relitigation of a criminal matter due to his own mistakes or his dissatisfaction with a verdict. Such a conviction does not violate the fundamental fairness notions implicit in due process of law.

This Court should also remember that the same transaction test is not a rule that necessarily expands the Double Jeopardy protections of criminal defendants. Under *Ashe v. Swenson*, 397 U.S. 436, 443-47 (1970) a defendant who is *acquitted* at his first trial may not be retried subsequently for an offense, the elements of which necessarily were resolved in his favor at his first trial.

(Footnote continued on following page)

disproportionately.[29] Assuming, without admitting, that Brown has standing to claim, in support of his view of the same transaction Double Jeopardy test, that he is subject to unconstitutional multiple sentencing which is severely disproportionate to the total criminal conduct in which he engaged, this Court must reject his Double Jeopardy, excessive punishment argument. A criminal defendant who receives a prison sentence which is grievously excessive when compared with the nature of the criminal conduct for which he was convicted may claim that his punishment is so disproportionate that it violates the Eighth Amendment to the United States Constitution. See, *Downey v. Perini,* 518 F.2d 1288, 1290-92 (6th Cir., 1975) (Invalidating a sentence of 30 to 60 years for the sale of a "small" quantity of marijuana), *remanded on other grounds* 423 U.S. 993 (1975); *Hart v. Coiner,* 483 F.2d 136, 141-143 (4th Cir., 1973) (Invalidating Life Sentence,

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If this Court adopts a restrictive definition of when multiple offenses are contained in the same transaction, then arguably a defendant who is tried and *acquitted* at his first trial, and who might be protected from a subsequent trial by the *collateral estoppel doctrine* of *Ashe, supra,* may find himself subject to a second trial on the theory that the offense for which he is to be tried at the second trial fell outside the same transaction involved in the first trial.

For example, on the facts of Petitioner Brown's case, had he been acquitted by a jury at his first trial for the misdemeanor of operating a motor vehicle without the owner's consent, and if that misdemeanor offense is a lesser included offense of the felony of auto theft, the *Ashe,* Double Jeopardy, collateral estoppel doctrine might bar his second trial for the felony of auto theft. However, should this Court adopt a same transaction Double Jeopardy approach, then Brown, in this hypothetical example, might well be subject to a second trial on the felony, despite his first acquittal, on the theory that the two offenses occurred in two separate transactions, separated by nine days.

29. Brown was sentenced to 30 days in jail by the Lake County Municipal Court, *see* Appendix page 4, and one year of probation by the Cuyahoga County Common Pleas Court, *see* Appendix page 15.

under a recidivist statute, for passing bad checks), *cert. den.* 415 U.S. 938 (1974), *reh. den.* 416 U.S. 916 (1974).

The Eighth Amendment approach to the problems of disproportionate sentencing which may occur under the current, constitutionally recognized, same evidence rule is more salutory than the expansionist same transaction rule urged by Petitioner Brown. The Eighth Amendment approach avoids the necessity of *pre-trial* hearings on factual issues unrelated to guilt determining and subsequent federal habeas corpus collateral review of those factual determinations. At the same time, the Eighth Amendment approach accommodates society's important legitimate interest in factually establishing a defendant's violation of its criminal provisions and furnishes the trial court, *after factual guilt* has been affirmatively established, an opportunity to vitiate the problem of disproportionate sentencing by ordering that the defendant serve his sentences concurrently.

Consequently, Petitioner Brown's same transaction test is not the "only protection" available to criminal defendants faced with serial convictions for separate criminal acts, and it is not the most functional approach to striking a balance between the state's legitimate interest in vindicating their criminal laws and defendant's interests in protection against disproportionately severe punishments.

CONCLUSION

The judgment of the Ohio Court of Appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6933

NATHANIEL BROWN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

PETITIONER REPLIES TO TWO POINTS RAISED IN RESPONDENT'S BRIEF.

I.

The State argues that the record would give no reason for the Lake County prosecuting authorities to contact the Cuyahoga County prosecuting authorities for the purpose of joining or merging the two charges and, indeed, that the record does not reveal any communication. Brief for Respondent, at 2 n.1; 37-39.

The record does contain the complaint in the Willoughby Municipal Court drawn by a member of the Wickliffe Police Department. App. 3. The complaint states that the car is owned by Gloria Ingram and gives her East Cleveland address. The complaint further states that the information in the complaint is based on ". . .Investigation of the Wickliffe Police Department." App. 3.[1]

The face of the complaint necessarily raises the question of where the Wickliffe Police obtained the information in the first instance that Petitioner was driving Gloria Ingram's car without her consent. Since the investigation included discovering the name and address of the owner, normal police investigation at a minimum would also have easily discovered when and from where the car was originally taken.[2]

II.

The State argues that joyriding under Ohio Rev. Code 4549.04(D) is not a lesser included offense to auto stealing under Ohio Rev. Code 4549.04(A). The Ohio Court of Appeals explicitly held to the contrary. App. 22.

[1] The word "Wickliffe" in the Appendix is misspelled.

[2] Not of record is the fact that immediately upon Petitioner's arrest the Wickliffe Police contacted the East Cleveland Police. The East Cleveland Police went to the Wickliffe Police Station and within two hours of arrest obtained a confession. The confession admits taking the car from a parking lot in East Cleveland on November 29th, 1973. The State chose not to introduce the confession.

To support its interpretation the State argues that the two charges have different "characteristics" of intent[3] and prohibit different conduct. Brief for Respondent, at 13-14. Respondent cites no case law in support. Rather, it offers two hypothetical illustrations.

The first illustration, purporting to demonstrate different "characteristics" of intent, concerns a defendant who borrows a car which he does not know is stolen but which he paradoxically knows he is not authorized to operate. While operating the car, the defendant does not intend to permanently deprive the owner of possession. Brief for Respondent, at 12. The State uses this illustration to argue the obvious conclusion that the borrowing defendant can only be charged with and convicted of joyriding under Ohio Rev. Code 4549.04(D) and not auto stealing under Ohio Rev. Code 4549.04(A), thereby purportedly demonstrating that the statutes have different "characteristics" of intent.

The State's analysis is incomplete, however. It loses sight of what the original thief can be convicted of. Failing proof of an intent to deprive the owner of possession permanently, the original thief, as well as the borrowing defendant, can be convicted of joyriding under Ohio Rev. Code 4549.04(D). The reason is that a

[3] The State would seem to go farther and argue that intent is not even required under Ohio Rev. Code 4549.04(D). Brief for Respondent, at 11 n.9. The State's argument rests on a misreading of the statute. When read as a whole, the word "purposely" modifies ". . .without the consent of the owner" and not " . . .take, operate or keep. . ." See Ohio Rev. Code 2901.22(A), *eff.* 1/1/74, defining "purposely" under Ohio law prior to January 1st, 1974. See Legislative Service Commission Note to Ohio Rev. Code 2901.22 (1973).

thief who intends to permanently deprive the owner of possession necessarily also intends to deprive the owner of possession for some shorter period of time. It is because of this that joyriding under Ohio Rev. Code 4549.04(D) is a lesser included offense of auto stealing under Ohio Rev. Code 4549.04(A).

The State also argues that the two statutes prohibit different conduct. To support this proposition it offers an illustration of a thief who steals a car with a tow truck. The State concludes that because the thief does not sit inside, turn the ignition and touch the accelerator, he could never be convicted of " . . . *operating* the automobile without the owner's consent in violation of (Sec. 4549.04(D), Ohio Revised Code)." Brief for Respondent, at 13 (Emphasis added).

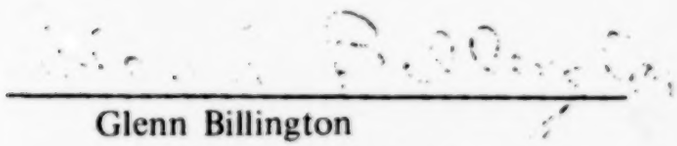
The conclusion is based on a misreading of the statute. Ohio Rev. Code 4549.04(D) is written in the disjunctive and, in addition to prohibiting "operating," it also prohibits "taking" and/or "keeping."[4] The Ohio Supreme Court has interpreted statutes of this type to mean that they are violated equally upon commission of any one of the prohibited acts. *Ohio v. Hopkins*, 26 Ohio St. 2d 119, 121-122 (1971). Consequently, the

[4] At page 11 of its brief, the State sets out the elements of Ohio Rev. Code 4549.04(D) citing as authority *Baldwin's Ohio Criminal Law*, 6th Ed., 1973 Cumulative Service, page 36. A review of that citation indicates that excluded from the State's brief are the alternative elements of "take" and/or "keep."

joyriding defendant who hot-wires a car, "takes" that car as surely as Respondent's tow-trucking thief.

Respectfully submitted,

Robert Plautz
(Court-appointed)



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Supreme Court of the United States

October Term, 1976

No. 75-6933

NATHANIEL BROWN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

SUPPLEMENTAL BRIEF FOR RESPONDENT

The Respondent, State of Ohio, files this Supplemental Brief pursuant to United States Supreme Court Rule 41 (5) and respectfully moves the Court to consider the authorities cited herein. This brief is necessary in order to clarify matters raised by Petitioner Brown's Reply Brief which was received by the Attorney for the State of Ohio on Friday, March 11, 1977 and matters raised in the United States Solicitor General's Brief in the case of *United States v. Jeffers*, Case No. 75-1805, cert. granted October 4, 1976 which was filed after the State of Ohio's Brief.

I

Petitioner Brown contends that his prosecution for the felony of auto stealing is barred by his prior conviction for the allegedly lesser included offense of operating a

motor vehicle without the owner's consent, despite the fact that the record in this court does not contain any showing that the initial charging authority had knowledge of the theft which occurred prior to the conviction for operating. See Petitioner Brown's Reply Brief, Part I.

First, the State of Ohio concurs with Brown's admission that "*indeed . . . the record does not reveal any communication*" between the initial charging authority and those authorities who caused Brown's second trial. The fact that the initial charging authorities' complaint states that the auto which Brown operated without the consent of the owner belonged to a Cuyahoga County resident is not sufficient to put the Lake County authorities on notice that a prior theft occurred in Cuyahoga County or anywhere else. Merely because an auto is found in one county, in the custody of someone who is not the owner, is not sufficient grounds for the initial charging authorities to conclude that it was stolen from the true owner in his county of residence. The Lake County authorities probably discovered the true owner from tracing the license plate in the state motor vehicle division, not by talking to her. On the record, in the condition it was presented to this Court by the petitioner's attorney, the Lake County authorities had every reason to believe that either the car was not initially stolen, or if it was stolen, that the theft was perpetrated anywhere, inside or outside of the state, by a third party who placed the car in Brown's custody for him to operate without the true owner's consent.

The State of Ohio concurs with Petitioner Brown in his statement in footnote 2 of his Reply Brief, that the matters contained in that footnote are "*Not of Record,*" and were never presented to any court during the prior proceedings in this case. Such material cannot be considered by the Court at this late date. See *Ciucci v. Illinois*, 356

U.S. 571, 573 (1958); *Stone v. Powell*, Case No. 74-1055, decided July 6, 1976, Slip Opinion 12-14, footnote 15.

Petitioner Brown, in his prior brief, and the Solicitor General's Brief at p. 48 in the *Jeffer's* case, *supra*, both suggest that this Court implicitly assumed in *Waller v. Florida*, 397 U.S. 387, 390 (1970) that prosecution and conviction for a lesser included offense, bars subsequent prosecution for a greater offense because the lesser offense is deemed the same offense for double jeopardy purposes. This Court made no such assumption in *Waller*. Examination of that opinion shows that the *Waller* Court viewed the first state prosecution in that case to be an "included" offense of the charge which resulted in the second prosecution and therefore both offenses were assumed to be "identical" and arise from the same acts. However, the words "lesser included offense" nowhere appear in the *Waller* decision. The *Waller* Court's assumption does not speak to the Double Jeopardy implications arising from a "lesser" included offense.

Furthermore, Petitioner Brown argues, in his main brief at page 11, "no case has been found to allow convictions for both the lesser and the greater offenses." However, in *Diaz v. United States*, 223 U.S. 442 (1912) a defendant was first prosecuted and convicted for assault and battery, and subsequently prosecuted for the homicide arising from one single act of beating his victim. The defendant incurred *first* a criminal punishment for the lesser included offense of the assault and battery, and then, an additional punishment for the homicide which was proved at his second trial, despite the fact that both charges arose from the single act of one beating.

The result in *Diaz* is consistent with the rule that different crimes are not the "same offense" under the Double Jeopardy Clause unless the defendant could have been convicted of the offense charged at the second trial on the

evidence needed to establish the bare elements of the charge tried in the first trial. See *State v. Brownrigg*, 87 Me. 500, 33 A. 11 (1895); 7 BROOKLYN LAW REV. 78, 83 (1937) or unless both charges are *symmetrically identical in law and fact*, see *Burton v. United States*, 202 U.S. 344, 380 (1906) (i.e. both crimes have same number of elements, with both crimes having elements whose descriptions perfectly match the other).

At the very least, Ohio agrees with the Solicitor General's Statement in his brief at page 44 in *Jeffers, supra*, that *Diaz* supports the rule allowing prosecution for the greater offense whenever, for legitimate reasons, like the authorities' lack of knowledge in Brown's case, the government could not have charged the greater offense at the trial of the lesser. For a case where such lack of knowledge was sufficient to permit the second prosecution, see *Williams and Wilson* (1965), N.I. 52 at p. 61, FRIEDLAND, DOUBLE JEOPARDY 192 (1969), quoted in the Solicitor General's Brief in *Jeffers* at page 45.

II

Petitioner Brown argues in his reply brief that the misdemeanor offense of operating constitutes a lesser included offense of the felony offense of stealing an auto. Brown's theory is that the misdemeanor offense (O.R.C. Sec. 4549.04(D)) is written in the disjunctive because Ohio courts have interpreted similarly worded provisions to be disjunctive, citing *Ohio v. Hopkins*, 26 Ohio St. 2d 119, 121-122 (1971). Thus, Brown erroneously concludes that the word "taking" in the misdemeanor statute (Sec. 4549.04(D)) means the same as the word "steal" in the felony statute (Sec. 4549.04(A)).

In *Hopkins supra*, at 120, the Ohio Supreme Court construed an Ohio statute which stated:

> "no person shall buy, receive, or conceal anything . . . which has been stolen . . ."

The *Hopkins* Court read this provision conjunctively, to create one offense of receiving stolen property. Thus, the Court wrote at 121-22:

> "A statute often makes punishable the doing of one thing, or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once and incurs only one penalty . . .
>
> This rule is sound because it permits the sensible construction that . . . a single course of criminal conduct —dealing in stolen property (is proscribed)."

The *Hopkins* Court then goes on to discuss a disjunctive statute, where several acts which are linked together by the word "or" are deemed to constitute separate crimes because the word "either" proceeds the series linked together by the word "or." See *Hopkins* at 122-123. Under the *Hopkins* analysis, an Ohio statute containing a series of words, limited by the word "or," without the modifier "either" is to be read so that each word in the series is deemed to modify the others, and therefore, such a statute creates *only one crime*. The misdemeanor statute in Brown's case, joy-riding (Sec. 4945.04(D)) conjunctively creates only *one* offense, i.e., operating a car without the owner's consent, because the word "either" does not appear in Sec. 4549.04(D) and cannot modify the series of items linked by the word "or." Since the absence of the word "either" from the joyriding statute signals the reader that the words in the series are intended to modify each other, it is clear that the word "taking" in the misdemeanor statute (Sec. 4945.04(D)) means "taking" in the sense of *operating* without the owner's consent, and cannot mean "taking in the sense of stealing," i.e., intending to perma-

nently deprive the owner of possession as contemplated by the felony offense (Sec. 4945.04(A)). See LEFAVE AND SCOTT, CRIMINAL LAW HORNBOOK SERIES) (West Pub. 1972) pages 131, 637, 694 footnote 15; Anno. 135 Am. St. R. 474, 497 (1911). Such an approach is consistent with the comments in the Legislative History to the misdemeanor joyriding statute which replaced on January 1, 1974, the joyriding provision under which Brown was convicted. In commenting on the traditional purpose of the joyriding statute, the Legislative Service Commission wrote:

> "This section defines . . . the offense commonly known as 'joyriding.' For some years auto theft has been an increasing problem, and in this type of offense, it is difficult to prove that the offender *intended to permanently deprive* the owner of the car. The offense of joyriding was designed to alleviate the enforcement problems this creates and *the gist of the offense is simply an unauthorized use of the vehicle. It is unnecessary to prove intent to permanently deprive the owner.*"
>
> (Emphasis added.)

See, OHIO CRIMINAL LAW AND PRACTICE, written by Schroeder and Katz, Vol. I, Banks Baldwin Law Publishing Company, Copyright 1974, quoting the Legislative Service Commission note dealing with Ohio Revised Code Section 2913.03 (eff. January 1, 1974). See also, Editor's *Comments.*

This Court should also note that in *State v. Ikner,* 44 Ohio St. 2d 132 (1975) decided several days after the Court of Appeals decision in Brown, the Ohio Supreme Court held that a city misdemeanor joyriding ordinance, worded almost identically to the misdemeanor statute under which Brown was convicted (4549.04(D)), was *not* a lesser included offense of the felony of concealing a stolen auto (O.R.C. 4549.04(E)), which felony like the

felony for which Brown was convicted (Sec. 4549.04(A)) is a larceny offense, requiring an intent to permanently deprive the owner of possession.

Therefore, the State of Ohio continues to urge that the misdemeanor joyriding statute is not a lesser included offense of the felony of auto stealing, either under Ohio law or under traditional double jeopardy analysis. However, even if this court should hold that the joyriding misdemeanor is a lesser included offense of the felony, the felony prosecution is permissible to furnish the State of Ohio with an opportunity to *certify Brown's factual guilt.* In such a case, the defendants true double jeopardy interest lies in protection from disproportionate punishment under the Eighth Amendment standards, or purposefully, wholely, arbitrary harassment under the Due Process Clause. See *Diaz* and Part II of Ohio's Main Brief. However, Brown has not suffered severe punishment at all. Had he been prosecuted only once, for the felony, he could have lawfully received a 20 year sentence. Instead, he was prosecuted twice and after serving only a handful of days in jail, complains that he has been treated unconstitutionally. Certainly, the fundamental law of the land was not designed to create such anomolies in favor of a defendant, who has knowingly and voluntarily admitted his guilt to all charges in open court.

Respectfully submitted,

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